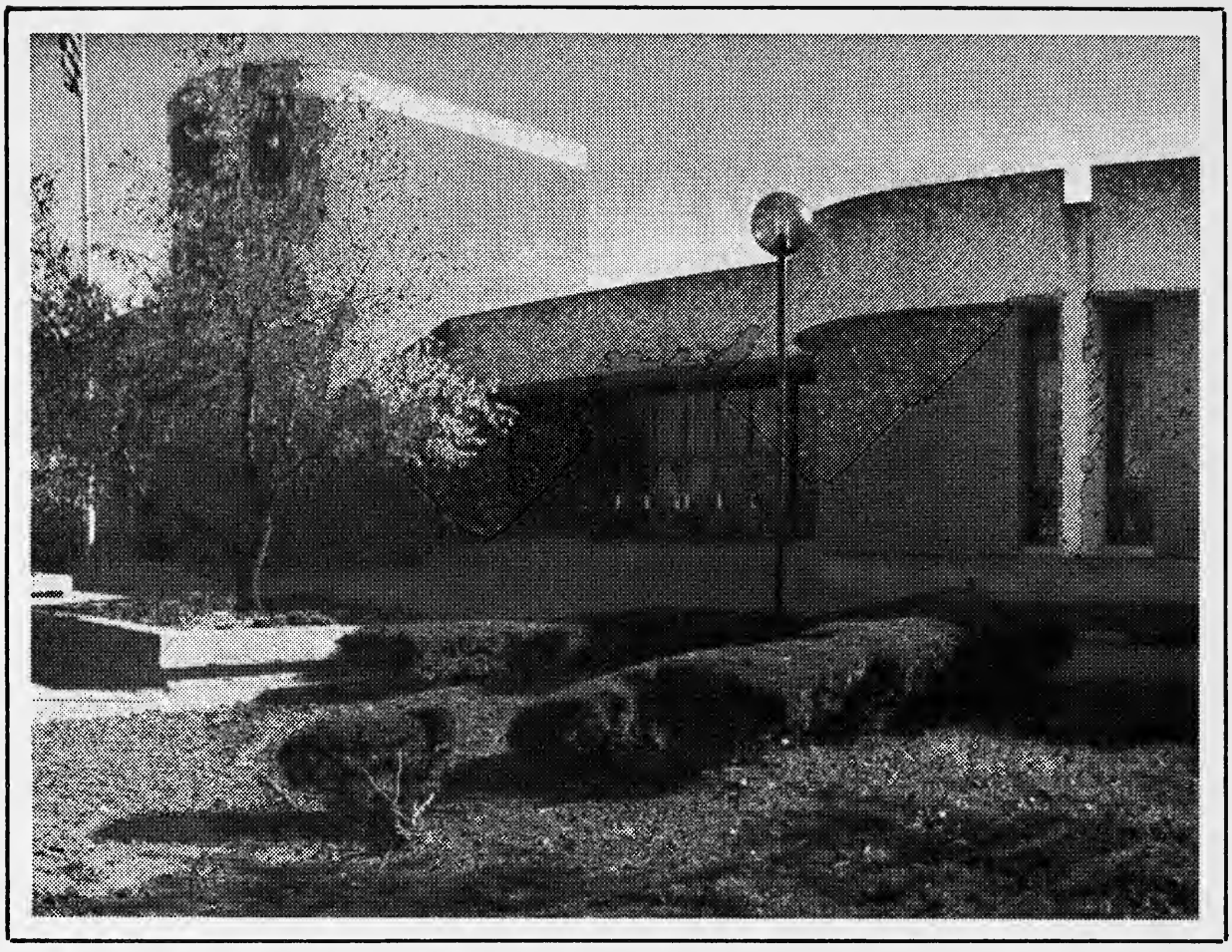
Indiana Law Review

Volume 26 No. 1 1992



Please enter my subscription to the INDIANA LAW REVIEW

NAME _____

ADDRESS _____

_____

_____

Enclosed is $_____ for ____ subscriptions.

Bill me for _____ subscriptions.

Mail to:

INDIANA LAW REVIEW
INDIANA UNIVERSITY
SCHOOL OF LAW—INDIANAPOLIS
735 West New York Street
Indianapolis, Indiana 46202

Subscription Rates (one year):

Regular, $25; Foreign, $28; Student, $17 (4 issues)
Single Issue, $8; Survey Issue $17

Indiana Law Review

Volume 26 1992-93

INDIANA LAW REVIEW

(ISSN 0090-4198)

Published four times a year by Indiana University. Editorial and Business Offices are located at:

Indiana Law Review
735 W. New York Street
Indianapolis, IN 46202
(317) 274-4440

Subscriptions. The current subscription rates are $25.00 per four-issue volume (domestic mailing) and $28.00 (foreign mailing). Unless the Business Office receives notice to the contrary, all subscriptions will be renewed automatically. Address changes must be received at least a month prior to publication to ensure prompt delivery and must include old and new addresses and the proper zip code.

Single and Back Issues. Current single regular issues may be obtained from the *Law Review* Business Office for $8.00. Current Survey issues may be purchased for $17.00. Please enclose payment with order. Complete sets and single issues of prior volumes are also available from the *Law Review* Business Office. Unless a claim is made for nonreceipt of issues within one year of the mailing date, we cannot guarantee supplying the issues without charge.

Manuscripts. The *Indiana Law Review* invites submission of unsolicited manuscripts. All citations should conform to *A Uniform System of Citation* (15th ed. 1991). Manuscripts should be triple-spaced with wide margins. The *Indiana Law Review*, as a matter of policy, promotes the use of gender-neutral language, and alternate use of the female or male pronoun is intended to refer to both female and male.

Indiana Law Review

Volume 26 1992 Number 1

TABLE OF CONTENTS

Articles

Notes

Comment

Indiana University School of Law—Indianapolis

1992-93 ADMINISTRATIVE OFFICERS AND FACULTY

Administrative Officers

THOMAS M. EHRLICH, *President of the University and Professor of Law.* LL.B., Harvard University.

GERALD L. BEPKO, *Vice-President, Indiana University; Chancellor, Indiana University-Purdue University at Indianapolis and Professor of Law.* J.D., IIT/Chicago-Kent College of Law; LL.M., Yale University.

NORMAN LEFSTEIN, *Dean and Professor of Law.* LL.B., University of Illinois; LL.M., Georgetown University.

THOMAS B. ALLINGTON, *Associate Dean for Academic Affairs and Professor of Law.* J.D., University of Nebraska; LL.M., New York University.

ARLENE G. ANDERSON, *Assistant Dean for Student Affairs.* J.D., Indiana University-Indianapolis.

JONNA M. KANE, *Assistant Dean for External Affairs.* J.D., Indiana University-Indianapolis.

JONI D. THOMPSON, *Assistant Dean for Development.* M.S., Ball State University.

ANGELA M. ESPADA, *Assistant Dean for Admissions.* J.D., Indiana University-Bloomington.

Faculty

THOMAS B. ALLINGTON, *Associate Dean and Professor of Law.* B.S., J.D., University of Nebraska; LL.M., New York University.

EDWARD P. ARCHER, *Professor of Law.* B.M.E., Rensselaer Polytechnic Institute; J.D., LL.M., Georgetown University.

JAMES F. BAILEY, III, *Professor of Law and Director of Law Library.* A.B., J.D., M.A.L.S., University of Michigan.

GERALD L. BEPKO, *Vice President, Chancellor and Professor of Law.* B.S., Northern Illinois University; J.D., IIT/Chicago-Kent College of Law; LL.M., Yale University.

ROBERT BROOKINS, *Associate Professor of Law.* B.S., University of Southern Florida; J.D., Ph.D., Cornell University.

DANIEL H. COLE, *Assistant Professor of Law.* A.B., Occidental College; A.M., University of Chicago; J.D., Lewis and Clark College; J.S.M., Stanford Law School.

PAUL N. COX, *Professor of Law.* B.S., Utah State University; J.D., University of Utah; LL.M., University of Virginia.

CLYDE HARRISON CROCKETT, *Professor of Law.* A.B., J.D., University of Texas; LL.M., University of London (The London School of Economics and Political Science).

DEBRA A. FALENDER, *Professor of Law.* A.B., Mount Holyoke College; J.D., Indiana University-Indianapolis.

DAVID A. FUNK, *Professor of Law.* A.B., College of Wooster; J.D., Case Western Reserve University; M.A., The Ohio State University; LL.M., Case Western Reserve University; LL.M., Columbia University.

PAUL J. GALANTI, *Professor of Law.* A.B., Bowdoin College; J.D., University of Chicago.

HELEN P. GARFIELD, *Professor of Law.* B.S.J., Northwestern University; J.D., University of Colorado.

HAROLD GREENBERG, *Professor of Law.* A.B., Temple University; J.D., University of Pennsylvania.

JEFFREY W. GROVE, *Professor of Law.* A.B., Juniata College; J.D., George Washington University.

FRANCES W. HARDY, *Clinical Assistant Professor of Law.* B.S., Ball State University; J.D., Indiana University-Indianapolis.

WILLIAM F. HARVEY, *Carl M. Gray Professor of Law & Advocacy.* A.B., University of Missouri; J.D., LL.M., Georgetown University.

PAUL T. HAYDEN, *Assistant Professor of Law.* B.A., Yale University; J.D., University of California, Los Angeles.

W. WILLIAM HODES, *Professor of Law.* A.B., Harvard College; J.D., Rutgers Newark.

LISA C. IKEMOTO, *Assistant Professor of Law.* B.A., University of California, Los Angeles; J.D., University of California, Davis; LL.M., Columbia University.

LAWRENCE A. JEGEN, III, *Thomas F. Sheehan Professor of Tax Law and Policy.* A.B., Beloit College; J.D., M.B.A., The University of Michigan; LL.M., New York University.

HENRY C. KARLSON, *Professor of Law.* A.B., J.D., LL.M., University of Illinois.

WILLIAM ANDREW KERR, *Professor of Law.* A.B., West Virginia University; J.D., LL.M., Harvard University; D.B., Duke University.

ELEANOR D. KINNEY, *Professor of Law and Director of the Center for Law and Health.* B.A., Duke University; M.A., University of Chicago; J.D., Duke University; M.P.H., University of North Carolina.

WALTER W. KRIEGER, *Associate Professor of Law.* A.B., Bellarmine College; J.D., University of Louisville; LL.M., George Washington University.

NORMAN LEFSTEIN, *Dean and Professor of Law.* LL.B., University of Illinois; LL.M., Georgetown University.

DEBORAH MCGREGOR, *Lecturer in Law.* B.A., University of Evansville; J.D., Georgetown University.

WILLIAM E. MARSH, *Professor of Law.* B.S., J.D., University of Nebraska.

SUSANAH M. MEAD, *Professor of Law.* B.A., Smith College; J.D., Indiana University-Indianapolis.

MARY H. MITCHELL, *Professor of Law.* A.B., Butler University; J.D., Cornell Law School.

JAMES P. NEHF, *Assistant Professor of Law.* B.A., Knox College; J.D., University of North Carolina.

THOMAS R. NEWBY, *Lecturer in Law.* A.B., J.D., Indiana University-Bloomington.

LESLYE A. OBIORA, *Assistant Professor of Law.* LL.B., University of Nigeria; LL.M., Yale Law School; J.S.D. Candidate Stanford Law School.

KIMBERLY E. O'LEARY, *Clinical Assistant Professor of Law.* B.A., Oberlin College; J.D., Northwestern University.

DAVID R. PAPKE, *Professor of Law and American Studies.* A.B., Harvard College; J.D., Yale University; M.A. in American Studies, Yale University; Ph.D. in American Studies, The University of Michigan.

RONALD W. POLSTON, *Professor of Law.* B.S., Eastern Illinois University; LL.B., University of Illinois.

JOAN M. RUTHENBERG, *Director of Legal Writing.* B.A., Mississippi University for Women; J.D., Indiana University-Indianapolis.

ANDREW T. SOLOMAN, *Lecturer in Law.* A.B., University of Michigan; J.D., Boston University.

KENNETH M. STROUD, *Professor of Law.* A.B., J.D., Indiana University-Bloomington.

JAMES W. TORKE, *Professor of Law.* B.S., J.D., University of Wisconsin.

JOANNE ORR VAN PELT, *Visiting Assistant Professor.* J.D., California Western.

JAMES PATRICK WHITE, *Professor of Law and Consultant on Legal Education to the American Bar Association.* A.B., University of Iowa; J.D., LL.M., George Washington University.

LAWRENCE P. WILKINS, *Professor of Law.* B.A., The Ohio State University; J.D., Capital University Law School; LL.M., University of Texas.

MARY T. WOLF, *Director of Clinical Programs.* B.A., Saint Xavier College; J.D., University of Iowa College of Law.

Emeriti

AGNES P. BARRETT, *Associate Professor Emerita.* B.S., J.D., Indiana University.

CLEON H. FOUST, *Professor Emeritus.* A.B., Wabash College; J.D., University of Arizona.

JOHN S. GRIMES, *Professor of Jurisprudence Emeritus.* A.B., J.D., Indiana University.

MELVIN C. POLAND, *Cleon H. Foust Professor of Law Emeritus.* B.S., Kansas State University; LL.B., Washburn University; LL.M., University of Michigan.

R. BRUCE TOWNSEND, *Cleon H. Foust Professor of Law Emeritus.* A.B., Coe College; J.D., University of Iowa.

Adjunct Faculty

CYNTHIA M. ADAMS, J.D., Indiana University-Indianapolis.
RICHARD P. GOOD, J.D., Indiana University-Indianapolis.
RALPH F. HALL, J.D., University of Michigan.
GRANT W. HAWKINS, J.D., Indiana University-Indianapolis.
THOMAS Q. HENRY, J.D., Indiana University-Indianapolis.
SWADESH S. KALSI, LL.M., George Washington University.
LARRY A. LANDIS, J.D., Indiana University-Indianapolis.
JANE MAGNUS, J.D., Indiana University-Indianapolis.
SHARON F. MURPHY, J.D., Indiana University-Indianapolis.
LAURA C. NEHF, J.D., University of Georgia.
GARY P. PRICE, J.D., Indiana University-Indianapolis.
THOMAS R. RUGE, J.D., Valparaiso University.
GEOFFREY SEGAR, J.D., Indiana University-Bloomington.
PATRICIA P. WAGNER, J.D., Indiana University-Indianapolis.

Law Library Faculty

JAMES F. BAILEY III, *Professor and Director of Law Library*. A.B., J.D., M.A.L.S., University of Michigan.
MINDE C. GLENN, *Assistant Director for Readers' Services*. B.A., Western Michigan University; M.L.S., Indiana University.
WENDELL E. JOHNTING, *Catalog Librarian*. A.B., Taylor University; M.L.S., Indiana University.
MAHNAZ K. MOSHFEGH, *Acquisition/Serials Librarian*. B.A., National University of Iran; M.S., Tehran University; M.A., Ball State University; M.L.S., Ph.D., Indiana University.
KIYOSHI OTSU, *Computer System Specialist and Catalog Librarian*. A.A., Parkland College; A.B., M.S., C.A.S., University of Illinois.
TERENCE L. ROSE, *Reference Librarian*. B.G.S., M.L.S., University of Michigan.

Indiana Law Review

Volume 26 1992 Number 1

ARTICLES

The Ethics Opinions of the Bar: A Valuable Contribution or an Exercise in Futility?

Jorge L. Carro*

Introduction

The practice of law in America has been regulated since early colonial days. Both legislatures and courts, from without, and the legal profession, from within, have adopted regulations governing the practice of law. The more visible regulations are in the form of statutes, court decisions, court rules, and codes of professional ethics. Although regulations have provided guidance to the practicing bar for many years, a substantial number of existing norms are not well known to the general public. Included in the latter group are the ethics opinions issued by bar associations.

The purpose of this Article is to measure the impact of ethics opinions on courts that decide matters relating to the legal profession. In this Article, the history of the regulation of the practice of law as a profession will be surveyed, the evolution of the ethics opinions of the bar associations will be traced, and a quantitative, as well as a qualitative, analysis of their impact upon the courts will be attempted.

---

* Professor of Law, University of Cincinnati College of Law. A.B., 1945, Havana Institute; J.D., 1950, University of Havana; M.L.S., 1969, Emporia State University. This Article emanated from a research project developed by Edy Carro Schlotman, J.D., University of Cincinnati College of Law, member of the Ohio Bar.

The author thanks the administration of University of Cincinnati College of Law for its financial support and Barbara R. Szucsik, University of Cincinnati College of Law, class of 1993 for her invaluable editorial assistance.

I. The Regulation of the Legal Profession: A Historical Perspective

A. Early Attempts

There were few lawyers in the early colonial period. Those who practiced were not only impoverished, but subjected to severely restrictive legislation, almost leading to their complete banishment.[1] These circumstances began to improve at the end of the seventeenth century, when in Virginia, Massachusetts, New York, and Maryland, an organized bar emerged.[2] The bar produced an array of better educated, true professionals who not only maintained a regular and extensive practice but who also established legal fees as their regular course of income.[3] The evolution of the legal profession did not preclude the continual promulgation of rules to regulate practitioners — particularly in the area of fees.[4] Nevertheless, at the time of the American Revolution, no uniformity existed for the enactment of rules, even in an area as important as the requirements for admission to the bar. For example, in Massachusetts, each county court admitted attorneys for all the courts in its jurisdiction. In Rhode Island, Delaware, and Connecticut, local courts handled bar admissions, although admission to one bar allowed attorneys to practice in all.[5] At times, regulations went beyond matters related to the practice of law itself. For example, in New York, each attorney was required to provide satisfactory proof that he had conducted himself as a good and zealous friend to the American cause.[6]

Between 1765 and 1840, the legal profession attained an unprecedented prominence in the leadership of the country. As one commentator expressed: "It was a time when lawyers spoke and acted with that conscious authority which is characteristic of truly creative founders and promoters of public institutions and policies."[7] However, it was only after 1875 that practitioners began to develop the concept of the legal

---

1. In Massachusetts, by a statute adopted in 1641, attorneys were allowed to plead causes other than their own, but all fees were disallowed. In Virginia, not only were all attorneys virtually eliminated in 1645, but heavy fines were imposed upon those remaining in practice in 1657. Francis R. Auman, The Changing American Legal System 19-26 (1940).

2. *Id.*

3. Alan F. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 Am. J. Legal Hist. 145-49 (1973).

4. Throughout 1678 and 1679, authorities in Charles County, Maryland ordered attorneys to collect 100 pounds of tobacco per case. This ruling remained in effect until 1690 when lawyers were permitted to charge up to 300 pounds. *Id.* at 163.

5. Lawrence M. Friedman, A History of American Law 276 (1973).

6. 2 Anton H. Chroust, The Rise of the Legal Profession in America 7 (1965).

7. *Id.* at 285.

profession as a "branch of the administration of justice" instead of "a mere money-making trade."[8]

B. The Organized Bar

Even after the American Revolution, the organized bar, as we think of it today, with internal organization and cohesion, was nonexistent. It was only in the late nineteenth century that local bar associations began to emerge.[9] In 1870, a number of prominent lawyers founded the Association of the Bar of the City of New York. In 1874, the Chicago Bar Association was created. Immediately thereafter, eight city and state bar associations were formed, all having as one of their main goals the improvement of the conditions of the bar.[10] A proliferation of bar organizations followed. By 1890, there were twenty state or territorial bar associations. By 1916, forty-eight associations existed. In 1925, every state and territory had associations of lawyers, although their formats varied.[11] The most important event in the history of the bar occurred in 1878, when the American Bar Association (ABA) was created in Saratoga, New York. The ABA's goals included the resurgence of the professional spirit of the bar combined with a sense of public duty, the improvement of legal education, formulation of standards for admission to the bar, and the achievement of legal reform.[12]

At the celebration of its centennial in 1978, the ABA counted a membership of 235,000 lawyers. Today, the ABA has a membership of 360,000. The Association continues its devotion to service to the profession and to the improvement of the administration of justice, but maintains as its primary goals the pursuit of professional integrity and professional development.[13]

II. The Ethical Norms of the Legal Profession

A. The Early Treatises

From the outset, the legal profession expressed great concern for the ethical behavior of its members, seeking guidance for ethical principles from organized bodies. Two works in particular had a significant impact

---

8. Henry S. Drinker, Legal Ethics 20 (1953).
9. James W. Hurst, The Growth of American Law: The Law Makers 285-86 (1950).
10. *Id.* at 286.
11. *Id.* at 287.
12. *Id.*
13. ABA Centennial: A Century of Service 5 (1979).

on the early development of professional ethical principles: David Hoffman's *Fifty Resolutions in Regard to Professional Deportment* (1822), and George Sharswood's *A Compend of Lectures on the Aims and Duties of the Profession of the Law* (1854). Both Hoffman and Sharswood were nineteenth century law teachers.[14]

Hoffman's work was reprinted in his *Course of Legal Study* in 1836. This work was a collection of moral maxims which established very high standards for the practicing lawyer, for example:

> XI. If, after duly examining a case, I am persuaded that my client's claim or defense (as the case may be), cannot, or rather ought not to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonorable use of legal means in order to gain a portion of that, the whole of which I have reason to believe would be denied to him both by law and justice.[15]

In Maxim XII, a pledge was made not to plead the Statute of Limitations.[16] Sharswood followed the same format, although his moral maxims were presented in the form of essays. Sharswood later developed an original contribution in his treatise *Legal Ethics* (1884).

For many years, these two treatises constituted the creed of the legal profession. Other less significant works on ethics which coexisted with or supplemented these two included Timothy Walker's *A Course of Legal Study* (1837), George W. Warvelle's *Essays in Legal Ethics* (1902), and Gleason L. Archer's *Ethical Obligations of the Lawyer* (1910).

B. The Codes of Ethics

1. The Alabama Code of Ethics.—As the legal profession attained maturity and the practice of law became more complex, the need arose for ethical norms of a more definite character than the merely encouraging works of Sharswood and Hoffman. In 1887, the state of Alabama promulgated its *Alabama Code of Ethics* based upon the aforementioned treatises.[17] The Alabama Code was composed of: (a) a preamble; (b) a quotation from Sharswood titled "High Moral Principle Only Safe Guide;" (c) "A Summary of the Duties of Attorneys," which constituted an oath of the profession; and (d) a relation of the "Duty of Attorneys to Courts and Judicial Officers." This last section comprised a series

---

14. ROBERT H. ARONSON ET AL., PROFESSIONAL RESPONSIBILITY 29 (1985).
15. DRINKER, *supra* note 8, at 339-40.
16. *Id.* at 340.
17. *Id.* at 352-63.

of fifty-six statements establishing the basic duties of lawyers in matters ranging from criticism of judges and trial conduct to the preservation of clients' confidences and contingent fees. The quotation from Sharswood starts with the following sentence: "There is, perhaps, no profession after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law."[18]

2. The ABA Canons of Professional Ethics.—In 1908, inspired by the Alabama Code, the American Bar Association adopted the original *Canons of Professional Ethics*, which initially included thirty-two canons, but which was subsequently amended and expanded to forty-seven.[19] The guidelines imparted by the committee studying the adoption of the code suggested that: "good behavior should not be a vague, meaningless or shadowy term devoid of practical application save in flagrant cases."[20] Based on this guideline, the ethical standards were better defined and measured, and recommendations were made that "a lawyer failing to conform thereto should not be permitted to practice or to retain membership in professional organizations."[21]

The Canons were numbered, each beginning with a one-sentence title followed by a lengthy explanation. For example:

> *When Counsel for an Indigent Prisoner*—A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.[22]

Among other provisions, the purchase of interests in the subject matter of litigation which the attorney conducted was prohibited, the furnishing of information to newspapers by an attorney on pending or anticipated litigation was condemned, and the solicitation of professional employment by circular, advertisement or personal communication or interview not warranted by personal relations was banned. The Canons also contained a series of rules of candor and fairness to be followed when appearing before the court and when dealing with other attorneys.[23] Provisions also addressed the division of fees, contingent fees, suing a client for a fee, as well as prohibitions on attorneys assisting in the unauthorized practice of law.[24] The Canons were in effect for more than sixty years

---

18. *Id.* at 352.
19. THOMAS D. MORGAN & RONALD D. ROTONDA, 1991 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 438-450 (1991).
20. ARONSON, *supra* note 14, at 29-30.
21. *Id.* at 30.
22. MORGAN & ROTONDA, *supra* note 19, at 439.
23. *Id.* at 443.
24. *Id.* at 441-42.

until they were superseded by a new code. However, its provisions are still occasionally cited in court decisions and in bar opinions. The most important contribution emanating from this code was that it allowed the courts and the bar to discipline attorneys for a violation of ethical norms.

3. The Canons of Judicial Ethics.—On July 9, 1924, the ABA adopted the Canons of Judicial Ethics.[25] The Canons of Judicial Ethics were similar to those adopted for the practicing bar, but their goal was the formulation of a series of principles for judicial behavior. The ABA later recognized that "the primary function of the judges is to pass on their own conduct." In 1945, the Ethics Committee recommended to the Board of Governors that they authorize the appointment of an Advisory Committee of five judges to whom the Committee might turn for advice in cases involving judicial conduct.[26]

Topics the Canons addressed included promptness, behavior in court, treatment of witnesses, the avoidance of impropriety, and abuse of discretion. The Canons condemned the acceptance of inconsistent obligations. Of special interest were the provisions in Canon 23 that pointed to the judiciary's exceptional opportunity and duty to promote legislation.[27] In 1970, the Canons became the Code of Judicial Conduct. In 1984, a paragraph was added to the comment of Canon 2 condemning judges' membership in institutions that practice "invidious discrimination." Recently, in August of 1990, a new Code was adopted by the House of Delegates of the ABA.[28]

4. The Code of Professional Responsibility.—In 1964, the ABA appointed a special committee charged with the responsibility of evaluating the standards of the profession because: (a) many aspects of the practice of law had changed drastically since the days of the old Canons; (b) those changes had made unreliable the present norms; and (c) there was increased recognition of the profession's public responsibility.[29] Another concern that moved the ABA towards reconsideration of ethical norms was the question of enforcement. The ABA maintained that while the Code should not deal directly with disciplinary action, the close relationship between "the contents of the Canons and the observance and enforcement thereof" should be recognized.[30]

The Special Committee on Evaluation of Ethical Standards worked for five years before any identifiable results were achieved. It was not

---

25. ABA Comm. on Professional Ethics and Grievances, ix (1957).
26. DRINKER, *supra* note 8, at 274.
27. *Id.* at 275-78.
28. MORGAN & ROTONDA, *supra* note 19, at 374-410.
29. ARONSON, *supra* note 14, at 30.
30. *Id.*

until 1969 that the Code of Professional Responsibility was adopted as a result of these studies.[31]

The new Code completely departed from the old Canons not only in format, with its more logical structure, but also in its enforceability.[32] The previous thirty-two canons were reduced to nine, and were presented as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationship with the public, with the legal system, and with the legal profession."[33]

The meaning of the canons was then spelled out in the "ethical considerations" (EC), described as "aspirational in character."[34] They expressed objectives towards which every lawyer should strive, and also enunciated principles that will guide lawyers when making moral decisions.[35]

The most distinctive feature of the new Code was the incorporation of the "disciplinary rules" (DR) which were mandatory in nature, and defined the "minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[36] With the adoption of the new format, the desire to comprise the aspirational standards of excellence and the standards of minimal performance in one body was achieved.[37] Now lawyers could look to the disciplinary rules for avoidance of what was prohibited, and at the same time, to the Canons and ethical considerations for guidance in their quest for the betterment of the profession. Since the adoption of the Code, bar disciplinary procedures have been enforced when violations of the DRs occur, unlike the Canons and ECs which are referred to solely for purposes of clarification. There are, however, rare exceptions, for example, in the application of Canon 9 regarding the appearance of impropriety.

Almost immediately, critics complained that the Code was insufficient in dealing with some of the more basic issues of the practice of law, such as the role of the lawyer as an instrument of change and development of the law, as well as the behavior of lawyers in their daily activities. Nonetheless, the new Code was recognized as a more practical instrument than its predecessor, and at any rate, "the elevation of standards comes in the main from neither exhortation nor codification."[38] One of the strongest criticisms was that the Code directed its attention to litigators,

---

31. 94 ABA Rep. 389-92 (1964).
32. Charles Frankel, Book Review, 43 U. Chi. L. Rev. 874, 877 (1976).
33. *Id.* at 877 (quotation omitted).
34. *Id.*
35. *Id.*
36. *Id.* (quotation omitted).
37. *Id.*
38. *Id.* at 886.

corporate lawyers, and large law firms while ignoring smaller law firms and solo practitioners.[39]

5. The Model Rules of Professional Conduct.—For its supporters, the adoption of the new Code signaled the completion of their task. This view was not universal. Immediately following its adoption, some observers characterized the Code, while a definite improvement from the hortatory Canons, as nothing more than a stepping stone to the ultimate goals of drafting a final and complete restatement of the law of the profession.[40] A new Code was needed which could address the developing social role of the attorney. In 1977, the ABA appointed the Commission on Evaluation of Professional Standards, also known as the Kutak Commission, to develop that Code. After three unsuccessful attempts, the Commission submitted the final draft of the proposed *Model Rules of Professional Conduct.*[41] The new proposed Rules were intended to be revolutionary and included proposals to make pro bono public work mandatory and to limit the attorney-client privilege respecting confidential information. However, much of the Committee's work went for naught, as the most dramatic changes were soundly defeated. Nearly all that was achieved was a change in format.[42]

With the new format, however, the Model Rules preserved the distinction between the legal order, the minimum duties and obligations of the attorney on one hand, and the moral order and aspirations for the improvements of the profession on the other hand. The former is found in the Rules which are mandatory—simple enunciations of postulates. Alternatively, the nonbinding comments consist of explanations of the Rules, elements of the legislative history and aspirations of the ideal behavior of lawyers. This format is similar to the one adopted by the American Law Institute in the Restatements of the Law. The impact of the new Rules is seen in their adoption by more than half of the states and their inspiration for modifications in the ethics codes of some of the remaining states.

III. The Ethics Opinions of the Bar Associations

The ethics opinions of the bar are issued at different levels: by the American Bar Association at the national level; by the state bar associations at the state level; and by county and city bar associations at the local level. In addition, specialized associations of lawyers, such as

---

39. Philip Schuman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 Geo. Wash. L. Rev. 244, 249-50 (1968).

40. Aronson, *supra* note 14, at 31.

41. *Id.*

42. Jorge L. Carro, Book Review, 56 U. Cin. L. Rev. 207, 209 (1987).

the Patent Law Association and the Federal Bar Association, also issue ethics opinions.

In some jurisdictions, including New Jersey, Ohio, Rhode Island, and Tennessee, special advisory ethics committees exist which are not directly affiliated with the bar. These committees, consisting of a body of lawyers appointed by the supreme court of the state, are empowered to issue advisory, nonbinding ethics opinions.[43] Although nonbinding, these opinions may have more persuasive value than those issued by the bar due to the close relationship between the issuing body and the highest court of the state. This is a recent phenomenon. The impact the actions of these special advisory committees may have on the self-assigned role of the bar associations for the interpretation of the ethical norms cannot be predicted at this early stage. However, it does not appear that the existence of these special advisory boards has created any type of interference with the work of the ethics committees of the bar. On the contrary, both types of advisory bodies appear to be engaged in a peaceful coexistence, as they quote from each other.[44]

Furthermore, prestigious and experienced law professors also issue ethics opinions from time to time which are also sporadically quoted by the courts. However, because of their non-bar nature, neither the supreme court boards' opinions nor those of legal scholars are included in this study.

A. The Ethics Opinions of the American Bar Association

1. The Origins and Development.—After the enactment of the original Canons of Ethics in 1908, the ABA recognized the need for an organized body capable of interpreting these Canons. To fill this void, it amended the ABA's constitution and by-laws to create the ABA Standing Committee on Professional Ethics. The by-laws read as follows:

> The Committee on Professional Ethics shall communicate to the Association such information as it may collect respecting the activity of state and local bar associations in respect to the ethics of the legal profession, *and it may from time to time make recommendations on the subject to the Association.*[45]

---

43. *See* N.J. Sup. Ct. R. 1:19 (1982); *Supreme Court Rules for the Government of the Bar of Ohio,* R.V. (1985); *Rules of the R.I. Sup. Ct. Ethics Advisory Panel* No. 1 (1990); and *Tennessee Sup. Ct. Rules* No. 9, § 26, (1980). *See generally Ohio State Bar Ass'n Reports,* and William W. Hunt, *An Overview of Formal Ethics Opinions in Tenn. 1980-1988,* 19 MEM. ST. U. L. REV. 275-325 (1989).

44. *See* Supreme Court of Ohio Bd. of Comm'r on Grievances and Discipline, Op. 8827 (1988) (quoting from opinions of the Arizona and Kentucky bars).

45. 39 ABA Rep. 559 (1914) (emphasis added).

In 1919, the Committee was renamed the Committee on Professional Ethics and Grievances[46] and, in 1922, its governing by-laws were rewritten to include additional provisions, such as the following:

> Be authorized in its discretion *to express its opinion concerning proper professional conduct, and particularly concerning the application of the tenets of ethics thereto, when consulted by officers or committees of state or local bar associations. Such expression of opinion shall only be made after consideration thereof at a meeting of the Committee, and approval by at least a majority of the Committee.*[47]

In 1958, the Committee on Professional Ethics and Grievances divided into the Committee on Professional Grievances (adjudicatory) and the Committee on Professional Ethics (advisory), which in 1971 was renamed Standing Committee on Ethics and Professional Responsibility.[48]

The Ethics Committee adopted rules of procedure on July 21, 1971. One of their primary purposes was to advise members of the Bar, in the form of opinions, on the ethical propriety of their contemplated professional or judicial conduct:[49]

> The Committee may issue opinions of two kinds: *Formal Opinions* and *Informal Opinions. Formal Opinions* are those upon subjects determined by the Committee to be of widespread interest or unusual importance. Other opinions are *Informal Opinions.* The Committee shall assign to each opinion a non-duplicative identifying number, with distinction between Formal Opinions and Informal Opinions.[50]

The opinions are issued upon written request to any ABA member and are based solely upon the facts presented. According to the limitations included in the Rules, opinions are not be issued on questions of law, on matters subject to litigation, or on questions involving previous conduct.[51]

2. The Sources.—

a. Official

---

46. ABA Comm. on Professional Ethics, 1 (1967).

47. *Id.* at 1-2. (emphasis added).

48. ABA Standing Committee on Ethics and Professional Responsibility. Composition and Jurisdiction; Rules of Procedure, *reprinted in* MORGAN & ROTONDA, *supra* note 19, at 457-59.

49. *Id.*

50. *Id.* (emphasis added).

51. *Id.*

As noted earlier, the American Bar Association's Formal Opinions were published in the *American Bar Association Journal*.[52] Summaries of certain informal opinions were included in the *Journal*, but most informal opinions were compiled in a separate volume appropriately titled *Informal Opinions*, which was regularly supplemented.[53]

In contrast, the opinions issued by the state and local bar associations are distributed in a variety of ways. Those deemed most important are printed and either circulated among the association's members or inserted into their official publications.[54] Certain digests, including Olavi Maru's *Digest of Bar Association Ethics Opinions*, publish condensed versions of both the state and local opinions together with the formal and informal opinions of the ABA.[55] Not all bar association opinions are reported, one reason being the lack of a standardized reporting system. However, seven thousand opinions were reported in Maru's 1972 *Digest*.[56]

Even with the above sources, there remained a need for a more comprehensive and centralized compendium of ethics materials. In 1980, the American Bar Association joined efforts with the Bureau of National Affairs and published the *Lawyer's Manual of Professional Conduct*. This is a regularly updated three-volume, loose-leaf service that publishes cases, ethics opinions, legislative actions, and disciplinary proceedings.[57] In the manual, the ABA formal and informal opinions are reproduced verbatim, while the state and local bar opinions are pinpointed on a selective basis and condensed.[58] At the same time the ABA continues to publish a loose-leaf service titled *Recent Ethics Opinions*.

In 1981 an individual attorney's ability to access ethics materials was greatly increased by the Shepard's/McGraw's addition of *Shepard's Professional and Judicial Conduct Citations* to its series of citators.[59] This citator is published triennially in March, July, and November, and each issue is cumulative.[60] The service consists of a compilation of citations not only to the ABA formal and informal opinions, but also to the rules of procedure of the American Bar Association's Standing

---

52. OLAVI MARU, DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 2 (1970). After their appearance in the A.B.A. *Journal*, the formal opinions were compiled in the official text which is the ABA *Opinions of the Committee on Professional Ethics Annotated*. Citations of the opinions refer to the compilation and not to the *Journal*. *See supra* note 46.

53. MARU, *supra* note 52, at 2.

54. In some states, selected opinions are published in condensed form in the state bar association journal.

55. *See* MARU, *supra* note 52.

56. *Id.*

57. Laws. Man. on Prof. Conduct (ABA/BNA) (1980).

58. *Id.*

59. SHEPARD'S PROFESSIONAL & JUDICIAL CONDUCT CITATIONS (Shepard's) (1981).

60. *Id.* at 5.

Committee on Ethics and Professional Responsibility.[61] Also cited are the Model Code of Professional Responsibility, the Model Rules of Professional Conduct, and the Code of Judicial Conduct.[62]

b. Unofficial

In addition to the official publications of the bar, several authors have contributed to the law of ethics by privately compiling and publishing ethics opinions. The first of these works was Henry S. Drinker's *Legal Ethics*, which was published in 1953 and reprinted upon demand in 1954.[63] Drinker, who was the Chairman of the ABA Committee of Professional Ethics and Grievances at the time of the publication, authored a treatise which relied heavily on court decisions as well as on ethics opinions. In fact, Drinker cited more than 900 cases, along with 287 published ABA formal opinions and more than 380 unpublished opinions.[64] Drinker also relied heavily upon the opinions of state and local bars, as evidenced by his citation to more than 3000 of their opinions.[65] Drinker's work was extremely popular in its time and its impact is still evident, as it is currently cited in court decisions and ethics opinions. In fact, some of the ethics opinions, reported as cited by the courts in this study, have not been directly quoted from the bar publications but from Drinker's work.

In 1966, Raymond L. Wise's *Legal Ethics*, the second seminal treatise on legal ethics opinions was published. The popularity of this work was evidenced by the appearance of a second edition in 1970, a reprint in 1972, and supplements in 1973 and 1979. Wise's work echoed the profession's growing respect for ethics opinions, for it was solely based upon hundreds of ethics opinions.[66]

In addition to these two works, which were considered the Delphian oracles of professional responsibility,[67] a number of textbooks, treatises, compilations, etc., have been devoted to the subject of legal ethics. With

---

61. *Id.* at 2-3.

62. The cited opinions are those that have previously appeared in *United States Reports*, *Supreme Court Reporter*, *Lawyers' Edition*, *Federal Reporter*, *Federal Supplement*, *Federal Rules Decisions*, *Bankruptcy Reporter*, *United States Claims Court Reporter*, and all state reports included in West's National Reporter System. It also includes those formal and informal opinions of the ABA and of the state and local associations cited in numerous law reviews, including the ABA *Journal*, and A.L.R. annotations. In addition, they refer to ethics opinions that are cited by the bar in their own opinions.

63. DRINKER, *supra* note 8, at ii.

64. *Id.* at 304-08, 380-410.

65. *Id.* at 410-36.

66. RAYMOND L. WISE, LEGAL ETHICS (2d ed. 1970).

67. Carro, *supra* note 42, at 209.

a few exceptions, these works consistently referred to the ethical opinions of the bar as persuasive authority, a view which is reflected in the court's characterization of opinions as "advice to members of the bar and the public."[68]

c. Computerized

Most recently, Westlaw and Lexis have incorporated in their data banks the ABA formal and informal opinions. In addition, Westlaw has started to include some of the states' opinions.

3. Present Status of the Ethics Opinions of the ABA: The Department of Justice Antitrust Suit.—In addition to the inherent rights of the states' highest court to regulate and guide the activities of the legal profession, lawyers have been able to police themselves through the disciplinary actions of their committees on grievances and the advisory efforts of their ethics committees. The disciplinary process usually involves both the court system and the Bar, since the attorney in question must be accorded his due process. However, the preventive efforts of the bar via the issuance of ethics opinions is a prerogative that the Bar has been exercising with full autonomy throughout its history. This concept of self-regulation has upset some and prompted questioning of the validity of self-regulation against governmental control.[69]

In 1980, the Florida House of Representatives considered proposing an amendment to the state constitution which would take exclusive jurisdiction over the bar away from the state Supreme Court. Similar attempts have occurred in Virginia, Arizona, New Jersey and other states.[70] In *Bates v. State Bar of Arizona*,[71] the United States Supreme Court established that when self-regulation conflicts with speech protected by the First Amendment, the protected speech must prevail. Furthermore, in *Goldfarb v. Virginia State Bar*,[72] the Supreme Court suggested that if the regulatory goal of the state is mandated in state policy, it will always prevail over federal anti-competitive goals, giving the edge to the states over the Bar.

As previously explained, the advisory ethics opinions of the Bar are provided by special bar committees in response to inquiries posed by the membership.[73] Usually, they are the product of carefully researched

---

68. WISE, *supra* note 66, at 9. *See also* International Graphics v. United States, 5 Cl. Ct. 97, 99 (1984).

69. Joseph W. Little & Randolph J. Rush, *Resolving the Conflict Between Professional Ethics Opinions and Antitrust Laws*, 15 GA. L. REV. 341, 341-42 (1980).

70. *Id.* at 341 n.2.

71. 433 U.S. 350 (1977).

72. 421 U.S. 773 (1975).

73. *See supra* note 50 and accompanying text.

and deliberated efforts, and some believe that they carry "about the same weight as an attorney general's opinion of law; they are studied opinions, due weighty consideration, but are not binding on the courts."[74] Despite the absence of binding force, the ethics opinions are widely circulated and do "discourage disapproved behavior."[75] This restraining effect has given rise to questions concerning antitrust violations.[76]

On June 25, 1976, the Justice Department filed a complaint under Section 1 of the Sherman Antitrust Act against the American Bar Association challenging the activities of the ABA regarding the regulation of advertising for attorneys.[77] The complaint alleged that the ABA had "violated Section 1 of the Sherman Act by adopting and policing unreasonable restrictions on competitive advertising by lawyers and that members of the A.B.A. have unlawfully combined and conspired with the defendant to abide by such restrictions."[78] Among the violations claimed were that the Bar's interpretation of the Code's provisions upon advertising was incorrect,[79] and that the ABA's Standing Committee on Ethics and Professional Responsibility's issuance of opinions interpreting and applying the provisions of the Code regarding advertising constituted a restriction on trade.[80]

On August 30, 1978, however, the Justice Department filed a motion dismissing the antitrust suit against the ABA without prejudice.[81] The main reason for the department's decision to dismiss came from the internal changes in the ABA during the time between the filing of the complaint and its dismissal. The Supreme Court's opinion in *Bates* catalyzed many of these changes.[82] As a result, the Bar took several

---

74. Little & Rush, *supra* note 69, at 343.

75. *Id.*

76. *Id.*

77. *Justice Department Dismisses Antitrust Suit Against American Bar Association*, 64 A.B.A. J. 1538 (1978) [hereinafter *Justice Department*].

78. From the Justice Department's memorandum in support of its motion to dismiss, *reproduced in id.* at 1539.

79. *Id.*

80. *Id.* at 1539-40.

81. *Id.* at 1538.

82. In this case the court declared that broad restrictions on advertising imposed by the state of Arizona violated the First Amendment, therefore voiding all existing state rules and regulations. The Arizona statute on advertising was identical to the ABA provision. Bates v. State Bar of Ariz., 433 U.S. 350 (1977); *see supra* note 71 and accompanying text.

steps directed towards relaxing its rules on advertising.[83]

As a result of the antitrust suit the ABA announced that in regard to advertising, neither the Code nor the interpretive (ethics) opinions of the Ethics Committee bind any individual lawyer, and that it takes no steps to assure individual compliance with them.

4. Composition, Jurisdiction and Procedure of the ABA Committee on Ethics and Professional Responsibility.—The ABA Committee on Ethics and Professional Responsibility consists of eight members, all lawyers. The Committee issues opinions, approved by a simple majority of its members, on proper professional and judicial conduct. The opinions are issued either on its own initiative, or when required to do so by a member of the Bar or an officer or committee of a state or local bar association. However, an opinion may not be issued on a question that is pending before a court.[84]

B. The Ethics Opinions of the State and Local Bar Associations

Long before the ABA issued its first ethics opinion in 1924, the New York County Lawyers' Association established its first ethics committee in 1908. In 1912, the committee was authorized to render ethics opinions.[85] This activity was not limited to the New York Bar, as many state and local bar associations followed their path; it was reported in 1980 that eighty percent of all state and twenty-three percent of all local bar associations issue ethics opinions.[86] The composition and procedures of these committees vary from state to state but the majority follow that of the ABA. One distinctive feature of these state and local bar committees is the active and influential role of bar counsels in drafting ethics opinions.

IV. Impact of Ethics Opinions of the Bar in Court Decisions

Regardless of the nonbinding status of the bar's ethics opinions, both federal and state courts have frequently referred to them when deciding cases relating to ethical issues of the profession. The courts have often followed these opinions, although at times they have distin-

---

83. After *Bates*, the ABA appointed a special committee to deal with the question of advertising. The Committee, in June 1978, recommended several changes directed to the relaxation of the rules; for example, allowing television advertising. *See Justice Department*, *supra* note 77, at 1540-41.

84. ABA Standing Committee on Ethics and Professional Responsibility. Composition and Jurisdiction, (1971), *reprinted in* Morgan & Rotonda, *supra* note 19, at 458.

85. Charles A. Boston, *Practical Activities in Legal Ethics*, 62 U. Pa. L. Rev. 103, 111 (1913).

86. ABA Directory of Bar Activities 14 (1980).

guished, and even criticized, them. The opinions have been applied by courts in many different contexts: conflicts of interest (the most popular area); advertising; fee disputes; civil claims; and even in questions of ineffective assistance of counsel. The organized bar, of course, relies heavily on these opinions in their adjudicatory decisions (disciplinary proceedings), as well as in their advisory role.

However, this apparent respect for ethics opinions has not been universally shared. Some strong voices, mostly emanating from the academic community, have expressed sharp criticism over their practical value. The criticism centers not only on questions of merit, but also on matters of procedure.

Although some isolated studies have been conducted relative to the ethics opinions of the bar, there is a need for a comprehensive study directed at measuring their impact on the courts, both from a quantitative as well as a qualitative point of view. These findings must be contrasted with the opinions of the critics.

The following section will be devoted to the presentation and analysis of the survey of the ethics opinions that we have conducted, and a review of the literature on the subject.

A. The Survey

Our study is based on a computerized survey of federal and state court decisions citing ethics opinions of the bar from 1924 to 1990. Based on the collected data a quantitative and qualitative analysis was attempted.[87]

B. Quantitative Analysis

The findings showed that a total of 1194 opinions were cited in 639

---

87. This empirical study was conducted by using LEXIS. The COURTS files from the GENFED library and the individual files from the STATES library were used. All necessary precautions were taken in attempting to make the survey as comprehensive as possible. Originally, the search was made using a combination of search terms like "committee," "professional," and "ethics." It was found, however, that there was no uniformity in the committee names nor in the way they were cited by the courts. It was only when a more general search term, "ethics," was used that substantial progress was achieved. The return was great and more than 4000 cases had to be reviewed. Another problem was the discrepancies in the scope of the different files. As those files are still at a developing stage, some covered a greater number of years than others. For all these reasons, the author cannot claim absolute inclusiveness. It is possible that a substantial number of cases citing ethics opinions remain undiscovered. However, if that is the situation, it will only reinforce our conclusions. In spite of all this, this cumbersome task could not be accomplished without the use of computerized legal research.

cases by federal and state courts at different levels. Of the cited cases, 203 were decided before 1978 and 436 thereafter. It was on August 30, 1978, that the Department of Justice filed the motion to dismiss its antitrust suit against the ABA after the bar announced its ethics opinions were not binding.[88] For quantitative analysis purposes the data obtained from the survey will be divided in two major groups: federal courts and state courts.

1. Federal Courts.—The federal courts were responsible for citing 317 opinions in 171 cases. A breakdown by court follows.

a. Supreme Court

In fourteen cases decided by the United States Supreme Court, thirty ethics opinions were cited: six ABA Formal; three ABA Informal, six issued by state or state-like bars (District of Columbia, Georgia, Kentucky, Maine, Michigan and Virginia); nine by the New York County Bar Association; and six by city bars (Chicago and New York City). Of the cited cases, three referred to ABA Committee on Ethics and Professional Responsibility, Formal Op. 148 (1935), which deals with the issue of solicitation and legal services for the poor.[89] Two cases cited ABA Informal Op. 955 (1975), which deals with the duty of counsel to avoid frivolous appeals.[90] One case cited ABA Informal Op. 469 (1961), which refers to pre-paid legal services.[91] In another case, a concurring opinion referenced two ABA formal opinions which related to radio and television broadcasting of court proceedings.[92] Finally, in three cases the Court relied on one state and two local bar opinions.[93]

---

88. The search covered the period of 1924 to 1990, but the first citation retrieved was 1946. The absence of citations between 1924 and 1946 may be attributed to the limitations on the publication of the opinions. Drinker's first printing of his text, which constituted the first attempt to publish the ethics opinions of the bar in an organized manner, appeared in 1953. *See* DRINKER, *supra* note 8.

89. The Court referred to this opinion in NAACP v. Button, 371 U.S. 415, 440 n.19 (1962), *In re* Primus, 436 U.S. 412, 437 (1978), and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 463 n.20 (1978).

90. Polk County v. Dodson, 454 U.S. 312, 323 n.14 (1981) and McCoy v. Court of App. of Wis., 486 U.S. 429, 436 n.8 (1988) (which also cited ABA Informal 956, similar to the aforementioned 955).

91. United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 224 (1967).

92. Estes v. Texas, 381 U.S. 532, 597 (1965) (Harlan, J., concurring) (referring to ABA Comm. on Professional Ethics and Grievances, Op. 67 (1932) & Op. 212 (1941)).

93. In Goldfarb v. Virginia State Bar, 421 U.S. 773, 777 (1975) the Court cited Op. 98 of the Va. State Bar Comm., and in both Bates v. State Bar of Ariz., 433 U.S. 350 (1977) and Ohralik v. Ohio State Bar Ass'n 436 U.S. 447, 460 (1978), reference was made to Op. 47 of New York County Bar Ass'n (quoting DRINKER, *supra* note 8, at 211 n.5). The Virginia opinion referred to fee schedules and the New York opinion with solicitation.

b. Courts of appeals

The federal courts of appeals cited a total of eighty-four ethics opinions in forty-one cases from 1972 to 1990. Thirty-six of the cited opinions were ABA formal and twenty ABA informal. Twenty opinions were issued by state bar associations,[94] three by county bar and five by city bars.[95] Some circuits appeared more inclined to cite ethics opinions than others.[96]

The cited opinions by the courts of appeals referred to a variety of ethical issues. Questions regarding fees were frequently resolved by the courts including: fee sharing,[97] attorneys' prohibition to charge non-legal fees as a broker,[98] minimum fee schedules,[99] contingent fees,[100] and fee negotiations.[101] The Courts' reliance on ethics opinions when dealing with motions to disqualify was also evident, as eight cases were identified in this area.[102]

---

94. Arizona (4), Connecticut (1), Delaware (1), District of Columbia (2), Florida (1), Illinois (1), Michigan (2), New York (3), North Carolina (1), Oregon (3), and Texas (1).

95. Los Angeles County (1), New York County (2) and New York City (5).

96. The Second Circuit led the group with nine citations (1979-88); DC followed with seven (1972-85); Ninth with five (1973-83); Seventh with five (1972-83); Fourth with four (1981-89); Fifth with three (1976-83); Third with two (1979-82); Tenth with two (1979-82) and Eleventh with two (1983-87). No opinions appeared to be cited by the First or the Eighth.

97. *See* Dietrich Corp. v. King Resources Co., 596 F.2d 422, 426 (10th Cir. 1979) (citing ABA Formal Op. No. 316 (1967)); National Treasury Employees Union v. United States Dep't of Treasury, 656 F.2d 848, 851-52 (D.C. Cir. 1981) (citing ABA Formal Ops. 48 (1931), 180 (1938), 294 (1958), ABA Informal Op. 544 (1975)); Digest of Bar Ass'n Ethics Ops. 647, 1272, 1391, 1429, 2245, 3020, 3304, 3610, 3735 (O. Maru ed. 1970); 1970 Supp. to the Digest of Bar Ass'n Ethics Ops. 5048, 5061, 5190, 5935 (O. Maru ed. 1972); 1975 Supp. to the Digest of Bar Ass'n Ethics Ops. 7509, 9178 (O. Maru ed. 1977); Stissi v. Interstate & Ocean Transp. Co., 814 F.2d 848, 852 (2d Cir. 1987) (citing ABA Formal Ops. 97 (1933) and 153 (1936)).

98. Leonard v. BHJK Corp., 469 F.2d 108, 113 (D.C. Cir. 1972) (citing ABA Informal Ops. 709 (1964) and 775 (1965)).

99. Mills v. United States, 713 F.2d 1249, 1255 (7th Cir. 1983) (citing ABA Formal Op. 302 (1970)).

100. *In re* Forfeiture Hearing as to Caplin & Drysdale Chartered, 837 F.2d 637, 654 (4th Cir. 1988) (Murnaghan, J., concurring) (citing ABA Informal Op. 1521 (1986)).

101. *See* Western Fire Ins. Co. v. National Union Fire Ins. Co., 477 F.2d 1026, 1028 (9th Cir. 1973) (citing ABA Formal Op. No. 198 (1939)), and Moore v. National Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1103 (D.C. Cir. 1985) (citing Op. 80-94 of New York City Bar Ass'n (1981) and Op. 147 of the District of Columbia Bar (1985)).

102. *See* General Motors Corp. v. City of N.Y., 501 F.2d 639, 649 (2d Cir. 1974) (citing ABA Formal Op. 37 (1931)); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975) (citing ABA Formal Ops. 330 (1972) and 339 (1975)); Woods v. Covington County Bank, 537 F.2d 804, 812-16 (5th Cir. 1976) (citing ABA Formal Ops. 26 (1930), 37 (1931), 135 (1935) and Informal Ops. 885 (1965) and 1166 (1970)); W.T. Grant Co. v. Haines, 531 F.2d 671, 674-76 (2d Cir. 1976) (citing ABA Formal Ops. 58 (1931), 102 (1933), Informal

When dealing with conflicts of interest involving government lawyers the courts have also paid attention to the ethical opinions of the bar, as evidenced on five occasions.[103] In one case involving conflicts between the insurer and the insured, the court referred to both ABA and state ethics opinions.[104] The other four cases—one involving conflicts of corporate attorneys, one with appearance of impropriety, and two related to conflicts in the prosecution—also referred to ethics opinions.[105]

Furthermore, in a variety of issues relating to ethics, the courts referred to or relied on ethics opinions on questions as diversified as: attorneys as witnesses,[106] liens on clients' files,[107] attorneys' work

---

Ops. 908 (1966), 1034 (1968), 1140 (1970), 1269 (1973)), and New York State Bar Op. 358 (1974); Armstrong v. McAlpin, 606 F.2d 28, 29-32 (2d Cir. 1979) (citing ABA Formal Ops. 37 (1931) and 342 (1975), as well as Op. 889 (1976) of the Bar of the City of York); and United States v. Heldt, 668 F.2d 1238, 1275 (D.C. Cir. 1981) (citing Oregon State Bar Comm. on Legal Ethics Op. 386 (1978)).

103. United States v. Ostrer, 597 F.2d 337, 339-40 (2d Cir., 1979) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 506 (1979)); LaSalle Nat'l Bank v. County of Lake, 703 F.2d 252, 258 (7th Cir. 1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975); Ill. State Bar Ass'n Professional Ethics Ops. 762 (1982) & 811 (1982)); McCuin v. Texas Power & Light Co., 714 F.2d 1255, 1264 (5th Cir. 1983) (citing Tex. Ethics Comm. Op. 148 (1957)); Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 440 (9th Cir.), *cert. denied*, 464 U.S. 851 (1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)); Unified Sewerage Agency v. Jelco Inc., 646 F.2d 1339, 1347-1350 (9th Cir. 1981) (citing ABA Comm. on Professional Ethics and Grievances, Formal Ops. 132 (1935) & 331 (1972); ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1157 (1970), 1235 (1972) & 1282 (1973); Or. State Bar Ops. 45 (1957), 57 (1957), 135 (1964), 218 (1972) & 376 (1977)).

104. *See In re* A.H. Robins Co., Inc., 880 F.2d 709, 751 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981); Conn. Informal Op. 83-5 (1982); Del. Op. 1981-1 (1981); Mich. Op. CI-866 (1983)).

105. *See* Evans v. Artek Systems Corp., 715 F.2d 788, 792 (2d Cir. 1983) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 516 (1962) and 1056 (1968)); First Wis. Mortgage Trust v. First Wis. Corp., 584 F.2d 201, 220 (7th Cir. 1978) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 885 (1965)); Jones v. Richards, 776 F.2d 1244, 1247 (4th Cir. 1985) (citing N. C. State Bar Ethics Op. 595).

106. *See* Permian Corp. v. United States, 665 F.2d 1214, 1219 (D.C. Cir. 1981) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1446 (1980)); *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 658 F.2d 1355, 1359 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 828 (1965)); United States v. Birdman, 602 F.2d 547, 552 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, and *cert. denied*, 445 U.S. 906 (1980) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 50 (1931)).

107. Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir. 1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 1461 (1980)).

product,[108] advancing living expenses to clients,[109] substituting a person for the defendant in a criminal procedure,[110] attorneys' liens,[111] Interest On Lawyers Trust Accounts (IOLTA),[112] solicitation in class actions,[113] and consideration of certain types of litigation as constitutionally protected.[114]

c. District courts

The district courts cited a total of 162 opinions in eighty-six cases from 1958 to 1990. Fifty-one of the cited opinions were ABA formal and twenty ABA informal. Fifty-two were issued by state bar associations,[115] fifteen by county bars,[116] and twenty-four by city bars.[117]

The opinions cited by the district courts addressed a variety of ethical issues. The district courts frequently applied bar opinions in the area of conflicts of interest,[118] particularly when dealing with questions of

---

108. Parrott v. Wilson, 707 F.2d 1262, 1271 (11th Cir. 1983), *cert. denied*, 464 U.S. 936 (1983) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974)); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1320 (1975); N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 328 (1974)).

109. *See In re* Ruffalo, 370 F.2d 447, 450 (6th Cir. 1966), *rev'd*, 390 U.S. 544 (1968) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 288 (1954)); *In re* Dawson, 609 F.2d 1139, 1143 (5th Cir. 1980) (citing Florida Bar Professional Ethics Comm. Op. 65-39 (1965)).

110. United States v. Thoreen, 653 F.2d 1332, 1340 (9th Cir. 1981), *cert. denied*, 455 U.S. 938 (1982) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 914 (1966)).

111. Jenkins v. Weinshienk, 670 F.2d 915, 920 (10th Cir. 1982) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1461 (1980)).

112. Cone v. State Bar of Fla., 819 F.2d 1002, 1005 (11th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 348 (1982)).

113. Halverson v. Convenient Food Mart, Inc., 458 F.2d 927, 930-31 (7th Cir. 1972) (citing ABA Comm. on Professional Ethics and Grievances, Formal Ops. 7 (1925) and 111 (1934); N.Y. City Bar Ass'n Comm. on Professional Ethics, Op. 717 (1948); N.Y. County Bar Ass'n Comm. on Professional Ethics, Op. 47 (1914) and 228 (1924)).

114. International Union v. National Right to Work Legal Defense & Educ. Found., 590 F.2d 1139, 1148 (D.C. Cir. 1978) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 148 (1935)).

115. Arizona (2), Connecticut (1), District of Columbia (8), Florida (2), Idaho (1), Illinois (2), Louisiana (3), Maryland (2), Massachusetts (2), Michigan (4), Mississippi (1), New Jersey (1), New York (10), Oklahoma (1), Oregon (2), Tennessee (1), Texas (6), Virginia (1), Washington (1), and Wisconsin (1).

116. New York (13) and Allegheny (2).

117. New York (21), San Diego (2), and San Francisco (1).

118. Forty-eight of the cases citing ethics opinions dealt with conflicts of interest issues.

disqualification,[119] confidentiality,[120] and government lawyers.[121] Other ethics opinions cited referred to fees, communication with adverse parties, recording of conversations, and advertising and solicitation.

d. Other federal courts

The federal courts' reliance on ethics opinions of the bar when dealing with ethics issues is not limited to the regular courts, as some federal courts with special jurisdiction have followed the same pattern. The United States Court of Claims (United States Claims Court after 1982) has cited six ethics opinions in four cases from 1977 to 1984. Three of these opinions were ABA formal opinions, one ABA informal opinion, one opinion issued by a state-like bar (District of Columbia), and one opinion was issued by a city bar (New York). The cases dealt with a variety of issues like conflicts, recording of conversations, and communication with witnesses.[122] In a 1982 case, the United States Court of Customs and Patent Appeals cited ABA Formal Opinion No. 342 (1975) in dealing with the question of disqualification of a government lawyer.[123]

The United States Court of International Trade, in a 1989 decision, cited ABA Formal Op. 342 (1985) in dealing with the specialization of government lawyers.[124] The United States Bankruptcy Courts have cited five ethics opinions in five cases from 1990 to 1991. Two of the cited opinions were ABA informal opinions, one opinion was issued by the New York State Bar, and two opinions were issued by the San Francisco Bar. The bankruptcy courts have referred to ethics opinions when dealing with problems of advance payment retainers.[125]

The military courts apply the Model Code of Professional Responsibility to its lawyer members when dealing with ethical issues. These

---

119. *See, e.g.*, Realco Servs., Inc. v. Holt, 479 F. Supp. 867, 871 (E.D. Pa. 1979) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 885 (1965)).

120. *See* Moore v. Margiotta, 581 F. Supp. 649, 652-53 (E.D.N.Y. 1984) (citing N.Y. State Bar Ass'n Op. No. 555 (1984)).

121. *See, e.g.*, *In re* Grand Jury Proceedings, 700 F. Supp. 626, 630, *aff'd*, 875 F.2d 927 (1989) (D.P.R. 1988) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

122. Kesselhaut v. United States, 555 F.2d 791, 793-94 (Ct. Cl. 1977) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975); N.Y. City Bar Ass'n Comm. on Professional Ethics, Op. 889 (1976)).

123. Ah Ju Steel Co., Ltd. v. Armco, 680 F.2d 751, 754 (C.C.P.A. 1982) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

124. National Bonded Warehouse Ass'n, Inc. v. United States, 718 F. Supp. 967, 971 (Ct. Int'l Trade 1989).

125. *In re* McDonald Bros. Constr., Inc., 114 B.R. 989, 1001-03 (Bankr. N.D. Ill. 1990).

courts have frequently referred to ethics opinions of the bar for clarification and explanation of the code provisions. Twenty-seven of these opinions have been cited in nineteen cases from 1955 to 1989.[126] Fifteen of these opinions were ABA formal opinions and nine were ABA informal. The rest of the opinions came from the bars of one state (Kentucky), one county (New York), and one city (New York). The cases in question mostly involved issues of conflicts of interest.[127]

2. State Courts.—The state courts, at different levels, have cited a total of 881 ethics opinions in 468 cases from 1948 to 1991. Two hundred and eighty-three of the cited opinions were ABA formal and 103 were ABA informal. Three hundred and twenty-six were issued by state bar associations (including state-like bars, e.g. D.C.), sixty-five by county bars and 104 by city bars. (See Appendix.)

Like the federal courts, the state courts have also addressed a variety of ethical issues when citing ethics opinions. The great majority of the cited opinions dealt with conflicts of interest,[128] followed by an array of issues such as splitting fees,[129] authority of an ethics opinion,[130] an attorney's duty to report other attorneys' misconduct,[131] definition of neglect,[132] bartering clients,[133] communications with corporate employees,[134]

---

126. These cases have been decided by a variety of military courts: U.S. Court of Military Appeals (5 cases), U.S. Army Court of Military Review (6), U.S. Navy-Marine Corps Court of Military Review (5), U.S. Air Force Board of Review (2), and U.S. Coast Guard Court of Military Review (1).

127. *E.g.* United States v. Nicholson, 15 M.J. 436, 438 (1983) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1474 (1982)).

128. *E.g.*, Turbin v. Superior Ct. of the State of Ariz., 797 P.2d 734, 737 (Ariz. Ct. App. 1990) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

129. Breckler v. Thaler, 151 Cal. Rptr. 50, 54 (Cal. Ct. App. 1978) (citing ABA Comm. on Professional Ethics and Grievances, Formal Ops. 153 (1936) & 204 (1940); ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 391 (1960), 848 (1965), 932 (1966), & 936 (1966)).

130. Esquire Care, Inc. v. Maguire, 532 So. 2d 740, 742 (Fla. Dist. Ct. App. 1988) (citing Fla. Bar Op. 86-5 (1986)).

131. *In re* Himmel, 533 N.E.2d 790, 793 (Ill. 1989) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1210 (1972)).

132. Attorney Grievance Comm'n v. Ficker, 572 A.2d 501, 504 (Md. 1990) (rejecting ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1273 (1973), 1428 (1979), & 1467 (1981)).

133. Detroit Bank & Trust Co. v. Coopes, 287 N.W.2d 266, 269 (Mich. Ct. App. 1979) (citing N.Y. County Bar Ass'n Comm. on Professional Ethics, Op. 109 (1943)).

134. Niesig v. Team I, 558 N.E.2d 1030, 1033-36 (N.Y. 1990) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1410 (1978); Alabama State Bar Ass'n Ethics, Op. RO-83-81 (1983); Alaska Bar Ass'n Ethics, Op. 71-1 (1971); Colorado Bar Ass'n, Op. 69 (1985); Idaho State Bar Ass'n, Formal Op. 21 (1960); Professional Ethics Comm., Bar of the State of Me., Op. 94 (1989); Massachusetts Bar Ass'n, Formal Op. 82-7 (1982);

and clients' documents.[135]

Some state courts appeared more inclined to cite ethics opinions than others. New York (144), New Jersey (116), and Oregon (44) led the states with a substantial number of ethics opinions cited during the survey period. It does not appear, however, that the courts of Nebraska, Vermont, or the Virgin Islands have ever cited ethics opinions. In citing ethics opinions, courts have shown preference for the ABA formals and informals, followed by those issued by their own state bars. Nonetheless, state courts eagerly cited opinions from other state and city bars. (See Appendix.)

The preceding quantitative analysis reveals a substantial number of cases reported by both federal and state courts, at various levels, that cited bar ethics opinions. Such citations have increased, instead of decreased, during the years following the ABA's announcement that its ethics opinions are not binding. Based on reported data, one must conclude that when courts are confronted with ethical issues they do not hesitate to rely on the bar ethics opinions for guidance.

C. Qualitative Analysis

In order to evaluate the impact that ethics opinions have on the decision making process of the courts, it is necessary to explore some methods of testing that are not purely quantitative; for example, measuring the degree of reliance the courts have displayed when referring to these opinions. In this section, by reviewing a selected group of court decisions, an attempt is made to measure this impact. The section is divided into: (1) ABA formal and informal opinions; and (2) state, county, and city Bar opinions.

1. ABA Formal and Informal Opinions.—It appeared in the great majority of cases surveyed that the courts have treated the ABA ethics opinions with great deference.

a. United States Supreme Court cases

In *McCoy v. Court of Appeals of Wisconsin*,[136] the United States Supreme Court dealt with the duty, or lack thereof, of a criminal defense

---

Los Angeles County Formal Ethics, Op. 410 (1983); Bar Ass'n of Nassau County, Op. 2-89 (1989); New York County Bar Ass'n Comm. on Professional Ethics, Op. 528 (1964); New York City Bar Ass'n Comm. on Professional Ethics, Op. 80-46 (1980)).

135. Gries Sports Enter., Inc. v. Cleveland Browns Football Co., Inc., Nos. 49184, 49197 (Ohio Ct. App., Cuyahoga County, April 25, 1985) (LEXIS, States library, Ohio file) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1376 (1977); Conn. Bar Ass'n, Informal Op. 82-4 (1981); Comm. on Ethics of the Md. State Bar Ass'n Informal Op. 84-8 (1983), Comm. on Professional and Judicial Ethics of the State Bar of Mich., Informal Op. CI-926 (1983)).

136. 486 U.S. 429 (1988).

lawyer to file a frivolous appeal. The Court, citing the ABA Committee on Ethics and Professional Responsibility, Informal Op. 955 (1955), decided that "an attorney, whether appointed or paid, is therefore under an ethical obligation to refuse to prosecute a frivolous appeal."[137] In doing so, the Court relied on the ABA Standards for Criminal Justice (1980) followed by ABA Informal Op. 955, which states that "like court-appointed lawyer, private counsel, 'ethically, should not clog the courts with frivolous motions or appeals.' "[138] Then, in a "*see also*" the Court referred to a court of appeals decision and to one of its own.[139] It might be inferred that the preferential position given to the ethics opinion in the Court's list of authorities reflects the deference the courts give to such opinions when dealing with matters of ethics. On the other hand, in *United Mine Workers v. Illinois State Bar Ass'n*,[140] the Court distinguished ABA Informal Op. 469 (1961) since it did not contemplate the situation at bar.

b. U.S. Courts of Appeals cases

The Eleventh Circuit upheld the correctness of a trust fund account maintained by an attorney and applied the standards of ABA Committee on Professional Ethics and Grievances, Formal Op. 348 (1982).[141] The United States Court of Appeals for the District of Columbia declined to rule on the issue, but found ABA informal opinions applicable in deciding on the impropriety of an attorney charging double fees when working in a double capacity as a broker and a lawyer.[142]

Questions of attorneys' fees provide an area where the courts interrelate with the bar. In *Stissi v. Interstate & Ocean Transport Co.*,[143] in dealing with a division of fees, the Second Circuit followed the interpretation of the Model Code of Professional Responsibility DR 2-107 (A) given by the ABA. On the other hand, the Fourth Circuit rebuked the ABA for stating in its Informal Op. 1521 (1986) that it was unethical for a lawyer not to offer prospective clients an alternative to contingent fee arrangements.[144]

In a case involving clandestine recording of conversations with witnesses, the Eleventh Circuit recognized that, although this practice did not violate

---

137. *Id.* at 436.

138. *Id.* n.8.

139. *Id.*

140. 389 U.S. 217, 224 (1967).

141. Cone v. State Bar of Fla., 819 F.2d 1002, 1005 (11th Cir. 1987), *cert. denied*, 484 U.S. 917 (1987).

142. Leonard v. BHJK Corp., 469 F.2d 108, 113 (D.C. Cir. 1972) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 709 (1964) and 775 (1965)).

143. 814 F.2d 848, 851-52 (2d Cir. 1987) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 97 (1933) and No. 153 (1936)).

144. *In re* Forfeiture Hearing as to Caplin & Drysdale, 837 F.2d 637, 650-651 (4th Cir. 1988) (en banc) (Murnaghan, J., concurring), *aff'd*, 491 U.S. 617 (1989).

any law, the ABA in its Formal Op. 337 (1974) had ruled this practice unethical, and the court proceeded accordingly.[145]

In dealing with cases involving government attorneys, the courts have frequently turned to the ABA opinions for guidance. In its search for a definition of what constitutes "substantial responsibility" of a former government lawyer in matters of disqualification, the Ninth Circuit adopted the definition given by the ABA in Formal Op. 342 (1975).[146]

In a case entailing the duty of an attorney to release papers belonging to a client, the Second Circuit applied ABA Informal Op. 1461 (1980), which stated that the lawyer is required to release the papers on reasonable conditions.[147]

c. U.S. District Court cases

District Courts have not been remiss in relying on ABA opinions. In cases involving government lawyers, the courts have referred to Formal Op. 342 (1975) as it has tempered the Model Code of Professional Responsibility DR 5-105(D) when applied to government officers.[148] Moreover, in *Caracciolo v. Ballard*,[149] this same opinion was applied in a case in which a former government attorney's use of information adverse to the government was at issue.[150]

Frequently, the courts have applied Formal Op. 337 (1974), which considers the recording of conversations of witnesses without their consent unethical.[151] Recently, courts have begun to use old opinions to interpret the new Model Rules, which were supposed to require less interpretation.[152] In one particular instance, a court relied on Informal Op. 828 (1965) to censure an attorney who invited a witness to engage him as attorney to represent the witness during a deposition.[153] In citing Informal Op. 885

---

145. Parrott v. Wilson, 707 F.2d 1262, 1271 (11th Cir. 1983), *cert. denied*, 464 U.S. 936 (1983).

146. Paul E. Iacono Structural Eng'r, Inc. v. Humphrey, 722 F.2d 435, 440 (9th Cir. 1983), *cert. denied*, 464 U.S. 851 (1983).

147. Pomerantz v. Schandler, 704 F.2d 681, 683 (2d Cir. 1983).

148. *In re* Grand Jury Proceedings, 700 F. Supp. 626, 630 (D.P.R. 1988), *aff'd*, 875 F.2d 927 (1989).

149. 687 F. Supp. 159 (E.D. Pa. 1988).

150. *Id.* at 160. *See also* United States v. Judge, 625 F. Supp. 901, 902 (D. Haw. 1986), *aff'd*, 855 F.2d 863 (9th Cir. 1988), *cert. denied*, 488 U.S. 959 (1988).

151. Haigh v. Matsushita Elec. Corp., 676 F. Supp. 1332, 1358 (E.D. Va. 1987). *See also* H.L. Hayden Co. v. Siemens Medical Sys., Inc., 108 F.R.D. 686, 690 (S.D.N.Y. 1985).

152. Baker v. Leahy, 633 F. Supp. 763, 765 (E.D. Pa. 1985) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

153. Aspgren v. Montgomery Ward & Co., Inc., 47 Fair Empl. Prac. Cas. (BNA) 1438, 1442 (N.D. Ill. 1984), *clarified*, 47 Fair Empl. Prac. Cas. (BNA) 1443 (1984), *aff'd*, 852 F.2d 1008 (7th Cir. 1988).

(1965), one court forcefully stated that "courts have enforced these precepts."[154] Furthermore, when applying the Model Code of Professional Responsibility DR5-102(A), the court cited ABA Formal Op. 339 (1975) to hold that it "is not a per se rule which requires a literal application; rather, its application depends 'upon the attending facts.'"[155]

d. Other federal court cases

Even the U.S. Court of Claims has cited ABA Informal Op. 480 (1961), in resolving a dispute regarding an attorney's use of a recording device for court proceedings.[156]

e. State court cases

As has been the case with federal courts, the state courts at different levels have frequently cited ABA ethics opinions, recognizing their important role, when dealing with questions of ethics.

Cases in which state courts cited ABA opinions with more frequency than others are in the area of conflicts of interest. Conflict of interest issues frequently burden the courts, not only through disciplinary proceedings, but also in motions to disqualify. A group of cases dealing with this issue follows, selected at random from among the many decided by state courts all around the country.

An Alabama court followed ABA Formal Op. 330 (1972) clarifying the meaning of the term "associate" in Model Code of Professional Responsibility DR5-105(D).[157] In the same vein, another court referred to an ABA opinion for the definition of "matter."[158] One court relied on ABA Formal Op. 342 (1975) for the definition of "substantial responsibility" when delineating the duties of a lawyer in an imputed disqualification case.[159] Regarding the need of consent from both clients when there is a conflict, a reference to an ABA opinion was made in *Johnson v. Jones*.[160] However, an Arkansas court determined that some conflicts cannot be remedied with consent, basing its holding on both a previous case and ABA Formal

---

154. INA Underwriters Ins. Co. v. Nalibotsky, 594 F. Supp 1199, 1205 (E.D. Pa. 1984) (quoting American Roller Co. v. Budinger, 513 F.2d 982, 984 (3rd Cir. 1985)).

155. Rubino v. City of Mount Vernon, No. 82 Civ. 3101 (RWS) (S.D.N.Y. Apr. 25, 1984) (LEXIS, Genfed library, Distfile). *See also* Freschi v. Grand Coal Venture, 564 F. Supp. 414, 416-17 (S.D.N.Y. 1983) (see attached subs. history).

156. Grimes v. United States, 4 Cl. Ct. 205, 206 (1983).

157. Terry v. Alabama, 424 So. 2d 710, 713 (Ala. Crim. App. 1982).

158. Comm. for Wash.'s Riverfront Parks v. Thompson, 451 A.2d 1177, 1188 (D.C. 1982) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 342 (1975)).

159. Colorado v. Anaya, 732 P.2d 1241, 1242 (Colo. Ct. App. 1987), *rev'd en banc*, 764 P.2d 779 (Colo. 1988).

160. 652 P.2d 650, 653-54 (Idaho 1982).

Op. 192 (1939).[161] When a husband and wife both practice law, the court, applying Formal Op. 340 (1975), held that there was not necessarily a conflict when practicing in different law firms.[162] Moreover, when deciding on the impropriety of joint representation in adoption proceedings, an Ohio court followed a New York State Bar Association ethics opinion in contradiction to a previous court decision.[163] A similar situation occurred in Oklahoma.[164] Other areas are similarly represented by the use of ethics opinions. One court's decision rested entirely on when it was proper for an attorney to testify as a witness and remain in the case.[165] The same situation took place in *West v. Mississippi*.[166]

In a decision involving the retention of attorney's liens, two Justices of the Arizona Supreme Court, after recognizing that the state bar "has refrained from taking a position" on the matter, referred to ABA Informal Op. 1461 (1980), and, together with opinions of other state bars, dissented from the majority opinion finding that the attorney's conduct was ethical.[167]

In stating that a corporate attorney who acts as a legal advisor for a corporation must refrain from taking part in any controversies or factional differences among stockholders, a California court relied on an ABA ethics opinion as a basis for its decision.[168] A District of Columbia court cited ABA Informal Op. 1273 (1973) to define neglect in a competence situation.[169]

At times, courts attempt in vain to find an ABA ethics opinion. One curious example was when a Florida court mentioned in a case that "[w]e have found no opinion of this Court or other jurisdiction, or of the ABA Committee on Ethics and Professional Responsibility which addresses the issue. . . ."[170]

---

161. City of Little Rock v. Cash, 644 S.W.2d 229, 235-36 (Ark. 1982) (quoting *In re* A. & B., 209 A.2d 101, 102-03 (N.J. 1965)), *cert. denied*, 462 U.S. 1111 (1983).

162. Jones v. Jones, 369 S.E.2d 478, 479-80 (Ga. 1988).

163. *In re* Adoption of Infant Girl Banda, 559 N.E.2d 1373, 1382 (Ohio Ct. App. 1988) (citing N.Y. State Bar Ass'n Comm. on Professional Ethics, Op. 584 (1987)).

164. Oklahoma *ex rel.* Okla. Bar Ass'n v. Stubblefield, 766 P.2d 979, 982 (Okla. 1988) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 87-1523 (1987)).

165. Andrea Dumon, Inc. v. Pittway Corp., 442 N.E.2d 574, 581 (Ill. App. Ct. 1982) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 339 (1975)).

166. 519 So. 2d 418, 423-24 (Miss. 1988) (en banc) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 339 (1975)).

167. National Sales & Serv. Co., Inc. v. Superior Ct. of Maricopa County, 667 P.2d 738, 743 (Ariz. 1983) (en banc) (Cameron & Gordon, J.J., dissenting).

168. Hoiles v. Superior Ct. of Orange County, 204 Cal. Rptr. 111, 115 (Cal. Ct. App. 1984) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 86 (1932)).

169. *In re* Franklin, 516 A.2d 171, 173 (D.C. 1986), *cert. denied*, 479 U.S. 1087 (1987).

170. Florida Bar v. Jackson, 494 So. 2d 206, 209 (Fla. 1986).

On the duty to report any unprivileged knowledge of a lawyer's violation of ethics, an Illinois court found "instructive" the position taken in ABA Informal Op. 1210 (1972).[171] State court cases involving attorney's fees is another area in which ABA ethics opinions are commonly cited. An Illinois court relied on ABA Formal Op. 153 (1936) to determine "that a 'mere recommendation is not a sufficient basis for a forwarding fee.' "[172] In addition, an Indiana court applied the "reasonableness" and "clearly excessive" tests of the Code of Professional Responsibility and the Rules of Professional Conduct, as well as the ABA Informal Op. 86-1521 (1986), in dealing with a contingent fee case.[173]

Occasionally a state court has distinguished an ethics opinion. An Illinois court, replying to a party's pretense to rely on an ABA opinion, rejected his contention because his authority was "misplaced."[174]

Just to cite an example of an ethics decision dealing with a government lawyer, a Kentucky court, in deciding that Model Code of Professional Responsibility DR 5-195(D) does not apply to a government lawyer, said that "[w]e believe this question has been dealt with in a formal opinion, . . ." citing ABA Formal Op. 342 (1975).[175]

Furthermore, addressing the validity of Interests on Lawyers Trust Account (IOLTA), a Massachusetts court decided that an attorney may ethically participate in those programs according to ABA Formal Op. 348 (1982).[176] Similarly, in Minnesota the state supreme court also relied on the same ABA opinion,[177] as did the state supreme court of New Hampshire.[178] Finally, a dissenter from the majority decision that an attorney had the duty to disclose the client's whereabouts expressed: "My position is supported by the ABA Committee on Professional Ethics. . . ."[179]

2. State, County and City Bar Opinions.—Although the courts have relied primarily on ABA formal and informal opinions when dealing with

---

171. *In re* Himmel, 533 N.E.2d 790, 793 (Ill. 1988).

172. Phillips v. Joyce, 523 N.E.2d 933, 939 (Ill. App. Ct. 1988).

173. Lutz v. Belli, 516 N.E.2d 95, 103 (Ind. Ct. App. 1987) (Ratliff, C.J., concurring).

174. Petrillo v. Syntex Lab., 499 N.E.2d 952, 964 (Ill. App. Ct. 1986) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 892 (1965)), *appeal denied*, 505 N.E.2d 361 (Ill. 1987), *cert. denied*, 483 U.S. 1007 (1987).

175. Summit v. Mudd, 679 S.W.2d 225, 226 (Ky. 1984).

176. Petition by the Mass. Bar Ass'n and the Boston Bar Ass'n, 478 N.E.2d 715, 718 (Mass. 1985).

177. *In re* Petition of the Minn. State Bar Ass'n, 332 N.W.2d 151, 158 (Minn. 1982).

178. Petition of N.H. Bar Ass'n, 453 A.2d 1258, 1261 (N.H. 1982).

179. Pennsylvania v. Maguigan, 470 A.2d 611, 633-34 (Pa. Super. Ct. 1983) (Montemurg, J., dissenting) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936)), *rev'd*, 511 A.2d 1327 (Pa. 1986).

questions of ethics, they also take into consideration the opinions issued by state, county, and city bar associations. When courts have addressed these types of opinions, the opinions were given the same deferential treatment as their counterparts from the ABA.

a. United States Supreme Court cases

Of the fourteen United States Supreme Court cases citing ethics opinions, six involved, in one way or another, state, county, and city opinions. In *Goldfarb v. Virginia State Bar*,[180] the Court, after analyzing two Virginia ethics opinions, concluded that the minimum fee schedules approved by the bar were mandatory, and as such, were within the reach of the Sherman Act. On the other hand, in *Evans v. Jeff D.*,[181] the Court held that it was unethical for defense lawyers to request fee waivers in exchange for relief on the merits of plaintiffs, despite what the Fees Act might say. The Court in *Evans* quoted two New York City ethics opinions to reinforce its holding.[182] In *Bates v. State Bar of Arizona*,[183] the Court referred to the Preamble of New York County Bar Ass'n Ethics Op. No. 47 to introduce a historical element in the reasoning of the case. In *Ohralik v. Ohio State Bar Ass'n*,[184] a solicitation case, the same situation was repeated. A New York City opinion was cited in *Local No. 391 v. Terry*[185] to trace the history of the prohibition of simultaneous representation. In *Mallard v. United States District Court*,[186] the Court adopted the principle establishing an attorney's obligation to accept court appointments, basing its reasoning on one county and two city ethics opinions.

b. U.S. courts of appeals cases

The federal courts of appeals have also followed the trend; of the eighty cases citing ethics opinions, twenty-eight included opinions by the

---

180. 421 U.S. 773 (1975); *see supra* note 93.

181. 475 U.S. 717, 728 (1986).

182. *Id.* The Court cites to Association of the Bar of the City of N.Y. Ops. 80-94 (1981) and 82-80 (1985). Also cited were D.C. Bar Ethics Op. 147 (1985), Ga. Bar Ethics Op. 39 (1984) (rejecting the reasoning of the N.Y. City Op. 80-94), and Grievance Comm'n of Board of Overseers of the Bar of Me. Op. 17 (1983).

183. 433 U.S. 350, 371 (1977) (citing DRINKER, *supra* note 8, at 210-11).

184. 436 U.S. 447, 460 (1978) (citing DRINKER, *supra* note 8, at 210-211).

185. 494 U.S. 558, 586 (1990) (Kennedy, O'Connor, & Scalia, J.J., dissenting) (citing Association of the Bar of the City of N.Y. Ethics Op. 662 (1944) (citing DRINKER, *supra* note 8, at 103).

186. 490 U.S. 296, 313 (1989) (Stevens, J., dissenting) (citing Chicago 33, N.Y. City 436 & 587; N.Y. County 338 & 371; Michigan 127) (citing DRINKER, *supra* note 8, at 62-63).

ethics committees of state, county, and city bar associations. The District of Columbia Circuit referred to this type of opinion in three separate cases. In *United States v. Heldt*,[187] the court referred to an Oregon ethics opinion, combined with statutory citations, to support its decision that it was improper for a prosecutor to participate in a case when he had a pecuniary interest in the outcome. In *Koller v. Richardson-Merrill, Inc.*,[188] the court cited an Oregon opinion to reinforce a quotation from an ABA opinion on the prohibition of recording conversations without consent of all parties involved. In *Moore v. National Ass'n of Securities Dealers*,[189] after conceding that it could not draw a uniform rule on fee negotiations from case law, the court recognized the conflict of interest problem and followed one state and one city ethics opinion. Furthermore, in *Cluett, Peabody & Co. v. CPC Acquisition Co.*,[190] which involved a question of billing practices, the court referred to a county bar opinion to support the crucial statement of the case: "Billing non-attorney time at an attorney's contractual rate, without identifying it as non-attorney time is fraudulent." Finally, in *In re A.H. Robins Co.*,[191] a case involving conflicts of interest, the court followed an ABA informal opinion, reinforced by three state opinions, in order to hold that "it is universally declared that the type of counselor in the case at bar represented the insured and not the insurer."

c. U.S. district court cases

Of the 162 opinions cited in eighty-six district court cases, ninety-one opinions were issued by state, county, or city bars. In *United States v. Central Adjustment Bureau, Inc.*,[192] the court considered whether it was unethical for an attorney to permit a collection agency to prepare and mail dunning letters using the attorney's stationery. In addressing this issue, the court mapped out a set of standards based solely on a string of ethics

---

187. 668 F.2d 1238, 1275 (D.C. Cir. 1981) (citing Or. State Bar Comm. on Legal Ethics Op. 386 (1978)), *cert. denied*, 456 U.S. 926 (1982).

188. 737 F.2d 1038, 1059-60 (D.C. Cir. 1984) (citing N.Y. Bar Ass'n Comm. on Professional Ethics Op. 328 (1974); ABA Comm. on Professional Ethics and Grievances, Formal Op. 337 (1974)), *cert. granted*, 469 U.S. 915 (1984), *and vacated*, 472 U.S. 424 (1985).

189. 762 F.2d 1093, 1103 (D.C. Cir. 1985) (citing Ass'n of the Bar of the City of N.Y. Comm. on Professional & Judicial Ethics Op. 80-94 (1981); D.C. Bar Legal Ethics Comm. Op. 147 (1985)).

190. 863 F.2d 251, 254 (2d Cir. 1988) (citing L. A. County Bar Ass'n Ethics Comm. Formal Op. 391 (1981)).

191. 880 F.2d 709, 751 (4th Cir.) (citing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1476 (1981); Conn. Informal Op. 83-15 (1982); Del. Op. 1981-1 (1981); Mich. Op. CI-866 (1983)), *cert. denied*, 493 U.S. 759 (1989).

192. 667 F. Supp. 370 (N.D. Tex. 1986).

opinions.[193] A New York district court, after stating that the business of the court is to dispose of litigation and not to act as a general overseer of the ethics of those who practice before it, felt compelled to act on a question of ethics where the case involved a communication with an adverse party's employees.[194] For the disposition of the matter, the court referred to a series of state and city opinions, which, combined with a few cases and an ABA opinion, allowed the court to establish a set of guidelines.[195] In deciding on the disposition of clients' documents in an attorney's files, another court applied two state ethics opinions.[196] In an attorney's lien case, a Mississippi court relied on one state and one city opinion to define which documents belonged to the attorney.[197] Finally, a Florida district court was faced with a government lawyer conflict in a class action. The court, recognizing that no applicable authority existed in the circuit, decided the case on the basis of a Florida ethics opinion and resisted plaintiff's counsel's effort to distinguish the ethics opinion.[198]

d. State court cases

It should not be a surprise that state courts tend to favor not only local ethics opinions, but also those of other states when deciding cases affecting the legal profession. Of the 877 ethics opinions that state courts have cited in 460 cases, 491 came from state, county, and city bar asso-

---

193. *Id.* at 380-81 (citing Tex. Ethics Ops. 160 & 161 (1957); Phila. Ethics Op. 61-8 (1961); Ass'n of the Bar of the City of N.Y. Ethics Ops. 153 (1930) & 866 (1965); Alleghany County Ethics Ops. 1962-1 & 1963-2; Wis. Bar Ethics Op. 11 (1961); N.C. Ethics Op. 487 (1985); Wash. Ethics Op. 84 (1960); N.Y. County Bar Ass'n Ethics Op. 300 (1932); in addition to ABA Comm. on Professional Ethics and Grievances, Formal Op. 253 (1943)).

194. Suggs v. Capital Cities ABC, Inc., 52 Fair Empl. Prac. Cas. (BNA) 1842, 1844 (S.D.N.Y. 1990).

195. *Id.* (citing D.C. Bar Comm. on Legal Ethics Op. 129 (1983); Ass'n of the Bar of the City of N.Y. Comm. on Professional Ethics Op. 80-46 (1980); Mass. Bar Ass'n Comm. on Professional Ethics Op. 82-7 (1982); Mich. Bar Ass'n Comm. on Professional & Judicial Ethics Informal Op. 535 (1980); Ill. State Bar Ass'n Comm. on Professional Responsibility, Op. 85-12 (1986); San Diego Bar Ass'n Ethics Comm. Op. 1984-5 (1984); L. A. County Bar Ass'n Formal Op. 410 (1983); Tenn. Bar Ass'n Op. 83-F-46 (1985); Tex. State Professional Ethics Comm. Op. 461 (1988); Md. Bar Ass'n Op. 83-4 (1982); Ohio Bar Ass'n Op. 81-5 (1981)).

196. Resolution Trust Corp. v. H—-, P.C., 128 F.R.D. 647, 648-49 (N.D. Tex. 1989) (citing Professional Ethics Comm. State Bar of Tex., Ethics Op. 395 (1980); Iowa State Bar Ethics Comm. Op. 87-21 (1988)).

197. Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, 476-79 (S.D. Miss. 1989) (citing Miss. State Bar Advisory Ethics Op. 144 (1988); San Diego Bar Ass'n Ethics Op. 1977-3 (1978)).

198. Norton v. Tallahassee Memorial Hosp., 511 F. Supp. 777, 780 (N.D. Fla. 1981) (quoting Professional Ethics Comm. of the Fla. Bar Op. 74-8 (1974)).

ciations. (See Appendix.) The reason for this favoritism may be that the local approach is closer to home than the positions taken by the national leadership, although these have not been totally ignored.

The New Jersey Supreme Court, in upholding sanctions against a lawyer facing disciplinary action, applied the principle that "[t]he fiduciary obligation of a lawyer applies to persons who, although not strictly clients, he has or should have reason to believe rely on him."[199] This principle was developed through a series of local ethics opinions. Distancing itself from the directives of three New York State Bar Association Ethics Committee opinions, a New York court refused to disqualify a part time Assistant County Attorney from representing defendants in criminal proceedings.[200] According to the court, absent compelling reasons, a court should not interfere with the right of a criminal defendant to choose his own counsel. The three New York ethics opinions not followed pointed to the disqualification.[201] A Massachusetts court, in deciding upon a waiver of the attorney-client privilege, adopted the principle established by a state ethics opinion which maintains that the attorney-client privilege continues despite the fact that the confidential information has become notorious.[202] One Delaware court did not hesitate to go outside the state for guidance in deciding that former employees are not within the scope of the rule against ex-parte communications.[203] Finally, relying exclusively on an opinion issued by its own state bar, an Ohio appeals court held that it would be unethical for an attorney to act both as an attorney and as a real estate broker in one transaction, and to charge one fee as an attorney and another as a broker.[204]

It is obvious from the preceding quantitative and qualitative analyses that for many years, courts have seriously considered the bar's ethics opinions when dealing with ethical matters. Courts have not only consistently referred

---

199. *In re* Gavel, 125 A.2d 696, 705 (N.J. 1956) (citing N.Y. County Bar Ass'n Ethics Op. 320 (1933); Ass'n of the Bar of the City of N.Y. Ops. 343 (1935) & 682 (1945). *See also* Mich. 150 (1952); Miss. 29 (quoting DRINKER, *supra* note 8, at 92).

200. Moxham v. Hannigan, 455 N.Y.S.2d 424 (N.Y. App. Div. 1982).

201. *Id.* at 427 (citing N.Y. State Bar Ass'n Ethics Comm. Ops. 367 (1974), 278 (1973) & 257 (1972)).

202. Commonwealth v. Goldman, 480 N.E.2d 1023, 1028-30 (Mass.) (citing Mass. Bar Ass'n Comm. on Professional Ethics, Op. 84-3 (1984)), *cert. denied*, 474 U.S. 906 (1985). The court also cited opinions 75-7 (1975), 76-12 (1976), and 77-1 (1977) of the same state bar committee. *Id.* Cal. Standing Comm. on Professional Responsibility & Conduct Op. 1980-52 (1980), Bar Ass'n of Greater Cleveland Professional Ethics Comm., Op. 150 (1983), and Vt. Bar Ass'n Comm. on Professional Responsibility Op. 83-6 (1983) were also cited. *Id.*

203. DiOssi v. Edison, 583 A.2d 1343, 1344 (Del. Super. Ct. 1990) (citing Colo. Ethics Op. 69 (Rev.) (1987); Fla. Bar Professional Ethics Comm., Op. 88-14 (1989); Alaska Ethics Op. 88-3 (1988); Ill. Ethics Op. 85-12 (1986)).

204. Ollick v. Rice, 476 N.E.2d 1062, 1069 (Ohio Ct. App. 1984) (citing Ohio State Bar Ass'n Comm. on Legal Ethics and Professional Conduct, Op. 9 (1950)).

to these opinions at all times, but also have treated them with deference. This reliance suggests that ethics opinions are an important component of the ethics laws to the courts.

D. Review of the Literature

In spite of the relevancy of ethics opinions, legal scholars have given them little or no attention. According to one of the few commentators who has considered this issue: "Few scholars have criticized individual [ABA Committee on Ethics and Professional Responsibility] opinions and no one has evaluated the Committee's work as a whole."[205] In fact, with minor exceptions, those few who have undertaken the task of studying these opinions have taken a critical view.

The most ambitious, although isolated effort, that has emerged from legal scholars has been the article authored by Professors Finman and Schneyer in 1981. These authors expressed a very negative approach in criticizing the ABA ethics opinions in their article. Although they concluded that these opinions have played a significant role in governing lawyers through the interpretation of the ethical norms, they believed that the ABA needed to reform its opinions by correcting the recurrent flaws in the analyses and by improving their poor record in reaching correct decisions. The authors also cautioned the Bar that if no reforms were instituted, or if reforms proved unavailing, the entire enterprise should be abandoned.[206]

The aforementioned conclusion was reached after the authors analyzed a selected group of ABA ethics opinions. Throughout their study they viewed the opinions as interpretations of ethical norms.[207] Despite the authors' concession that the opinions have great impact in the determination of the ethical conduct of lawyers,[208] they reached the conclusion that "these opinions are seriously flawed, so much so that their overall influence may well be unfortunate."[209] Professors Finman and Schneyer centered their criticism on what they believe is the deficient mechanism used by the ABA in preparing its opinions. First, because of the opinions' importance in regulating lawyers' conduct, they assert that ABA procedures should be adversarial, and not the product of mere reflections of individual members.[210] Second, they suggested that while alternative sources of guidance are available, such as scholarly works and consultation with colleagues, ethics op-

---

205. Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. Rev. 67, 72 (1981) (footnote omitted).

206. *Id.* at 167.

207. *Id.* at 69.

208. *Id.* at 70.

209. *Id.* at 72.

210. *Id.* at 73.

inions play a more significant role in guidance and offer such advantages as expediency, authority and total confidentiality.[211] Third, the authors preferred the opinions identify "a tenable, rule-based rationale" and "relevant authorities," as well as careful analysis of "problems of interpretive choice" and the achievement of "clarity."[212] They employed these standards when they tested the opinions, and thus, their severe criticism resulted. Finally, the authors complained of the lack of an adequate review process applicable to the ABA ethics opinions, because the opinions cannot be appealed, although they are occasionally reconsidered by the Committee itself.[213] Notwithstanding the negative approach used by Professors Finman and Schneyer, they predicted that the influence of the ethics opinions of the ABA was not likely to diminish in the future.[214]

In 1986, in his hornbook on legal ethics, Professor Wolfram expressed additional charges against the ABA ethics opinions. Wolfram asserted: (1) the quality of these opinions has been "uneven," reflecting the personal interests of the committee members; (2) these opinions are dogmatic, and fail to recognize apparent areas of doubt or ambiguity; and (3) they were more in the nature of "strong statement rather than flawless reasoning."[215]

Professors who teach courses in legal ethics have also neglected this topic. Although all of them have quoted ABA ethics opinions in their casebooks, the great majority of them have not included in their texts any explanation on what the ethics opinions of the bar are, their value, or their influence.[216]

One notable exception in this group is Professor Geoffrey C. Hazard, Jr. In his text, Hazard explains the meaning of the ethics opinions of the bar at different levels. He also comments that although the courts' decisions are the "only truly authoritative interpretation of the ethics rule," ethics opinions provide guidance as well as a good defense to attorneys facing disciplinary charges.[217]

---

211. *Id.* at 78-79.

212. *Id.* at 95.

213. *Id.* at 149-50.

214. *Id.* at 167.

215. CHARLES WOLFRAM, MODERN LEGAL ETHICS 66 (1986). Professor Wolfram's hornbook provides the most comprehensive and in-depth analysis of the law of ethics ever published.

216. *E.g.*, ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1984); THOMAS D. MORGAN & RONALD D. ROTONDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (5th ed. 1991); L. ROY PATTERSON, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY (2d ed. 1987); MAYNARD E. PIRSIG & KENNETH F. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (4th ed. 1984); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (1992); MORTIMER D. SCHWARTZ & RONALD C. WYDICK, PROBLEMS IN LEGAL ETHICS (1988); THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS (1985).

217. GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 14-15 (1990).

The bar has predictably shown an increased awareness of the impact of their ethics opinions. Two recent events attest to this awareness. On February 8, 1991, at the National Organization of Bar Counsels annual meeting in Seattle, a review was made of some of the different bodies which issue ethics opinions. This recognized the increasing contribution of this service to the disciplinary process.[218] Concurrently, on June 26, 1991, the American Bar Association Task Force on Law Schools and the Profession: Narrowing the Gap issued a tentative draft of its *Statement of Fundamental Skills and Professional Values* in which the ethics opinions of the bar were identified as primary sources for the interpretation of the rules of professional conduct — second only to the interpretation given by the courts.[219]

V. Conclusion

In spite of their nonbinding character, the bar's ethics opinions are frequently referred to by the courts. The courts treat these opinions with great deference, and, in fact, attribute to them a degree of attention similar to that usually found in the treatment of judicial opinions. In discussing the ethics opinions of the bar, courts follow, distinguish, criticize, parallel, and harmonize them just as courts do with judicial opinions. The most popular application of the ethics opinions is for clarification and interpretation of the ethical codes. However, their authority has occasionally been extended beyond this. Even when the ethics opinions were relied upon in conjunction with more binding authorities, such as case law, the courts assigned them a prominent, and not a secondary, role to add strength to the argument. Moreover, upon reviewing the quantitative and qualitative analyses and the opinions of legal scholars and the practicing bar, a consensus emerges on the relevance of ethics opinions for self-governance of attorneys.

---

218. National Organization of Bar Counsels, Complaint Containment: The Advisory Legal Ethics Opinion Role in the Disciplinary System, 1 (Feb. 8, 1991) (unpublished). The mission of these bodies was identified as: "to assist lawyers in the adherence to their professional codes or rules and to prevent the occurrence of misconduct through the use of Ethics Hotlines and written advisory opinions." For details on the program, see Laws. Man. on Prof. Conduct (ABA/BNA) Vol. VII, No. 2 at 36-37 (Feb. 27, 1991).

219. *Statement of Fundamental Lawyering Skills and Professional Values* 73-74 (Tent. Draft June 26, 1991). This report identifies as the primary sources of ethical rules: (a) the rules of professional conduct which have been formally adopted in the jurisdiction where the lawyer is practicing; (b) the interpretation of the applicable rules of professional conduct by the courts of the jurisdiction, the state or local bar associations, and other entities that are authorized to issue binding or persuasive interpretations of ethical rules; (c) model rules of ethics that have not been adopted in the jurisdiction; (d) constitutional, statutory, or common law principles related to the ethical obligations of the lawyer; (e) general aspects of ethical philosophy; and (f) the lawyer's sense of morality. *Id.* This report has been widely circulated as a public service of West Pub. Co. and is generating a wide variety of actions from both the bar and the academic community.

Therefore, it is fair to conclude that the contribution of the ethics opinions of the bar in the decision making process of the courts, and in resolving ethical issues, is an important one and not an exercise in futility as some may otherwise believe.

Nonetheless, some critics urge that there is a need for improvement in the procedure for managing ethics opinions, and in the quality and format of drafting as well. Suggested changes in procedure include: (1) making the process more adversarial, (2) creating a review process, and (3) improving the quality of the opinions. However, based on this research and my personal experience, injecting more antagonism in the advisory process and making the opinions reviewable will not only be counterproductive, but futile. There is much antagonism and delay in the judicial process already and more is not needed. Even still, there is ample room for improvements in the drafting of opinions. As is the case with judicial opinions, there are, and always will be, good and bad ethics opinions. This does not mean that efforts to improve opinions should not be attempted.

If, as it appears, ethics opinions of the bar are treated as an integral part of the law of ethics in lawyering, then the opinions must meet the highest standards of draftsmanship. Moreover, if the three major components of the legal community (legal educators, courts and bar) must deal with these opinions in one way or another, it is the responsibility of all parties to strive for their improvement. Legal educators should stress the importance of the ethics opinions not only by alerting the students to their existence and relevancy, but by exercising a more active role in constructive criticism of the opinions through legal scholarship. Courts should strive to achieve uniformity in utilizing ethics opinions, as some courts currently rely on them more than others. The courts should also contribute to the improvement of the quality of the opinions by taking a more critical view of the opinions when an occasion is presented.

The most important role is that of the bar. The drafters of ethics opinions—both the dedicated attorneys and the bar counsels—must be conscious of their professional responsibility and the transcendent value of their mission. They must be fully aware that every ethics opinion they draft, regardless of the jurisdiction (national, state, county or city) may eventually become an important part of the great repository of the law of ethics.

In addition, due to the transcendent role assigned to the opinions by the courts, the ethics committees should engage in thorough research of present and past ethics opinions of the bar together with analysis of pertinent present and past judicial decisions that have dealt with the opinions. The ethics committee should also consider the works of legal scholars. While ethics committees should not engage in social engineering or lawmaking, at the same time they should not ignore societal needs, clamors and perceptions.

Finally, the most important lesson of this study is that the ethics opinions of the bar provide more than a simple interpretation of ethical norms. The ethics opinions constitute the voice of one of the most influential segments of our society: the practicing bar. This voice, as proven here, does not fall on deaf ears. In matters of ethics, when the bar speaks, the courts listen.

Appendix
Bar Associations' Ethics Opinions Cited by State Courts

STATES*	CASES	ABAF	ABAI	STATE BARS	COUNTY BARS	CITY BARS	TOTAL
Alaska (1967-87)	(3)	3	0	0	0	0	3
Alas. (1964-90)	(9)	5	1	4[1]	0	1[2]	11
Ariz. (1968-90)	(21)	4	4	32[3]	0	4[4]	44
Ark. (1968-90)	(4)	7	1	2[5]	1[6]	0	11
Cal. (1950-79)	(11)	9	5	0	1[7]	2[8]	17
Colo. (1971-89)	(9)	7	0	2[9]	0	0	9
Conn. (1964-87)	(5)	5	0	3[10]	1[11]	0	9
Del. (1984-90)	(3)	1	0	7[12]	0	0	8
D.C. (1982-91)	(6)	1	1	6[13]	0	0	8
Fla. (1967-86)	(23)	5	4	27[14]	0	0	36
Ga. (1987)	(1)	1	0	0	0	0	1
Haw. (1969)	(1)	1	0	0	0	0	1
Idaho (1946-82)	(4)	0	2	2[15]	0	0	4
Ill. (1977-88)	(21)	18	2	10[16]	0	0	30
Ind. (1960-90)	(6)	4	2	2[17]	0	0	8
Iowa (1972-89)	(5)	2	3	0	0	0	5
Kan. (1958-82)	(14)	7	4	9[18]	1[19]	2[20]	23

* Dates refer to period of time when opinions were cited. State-like bars, e.g. D.C. and Virgin Islands, are included here.

1. Alaska (4)
2. N.Y. (1)
3. Ariz. (29), La. (1), N.C. (1), Tex. (1)
4. N.Y. (3), Chicago (1)
5. Mich. (2)
6. N.Y. (1)
7. N.Y. (1)
8. N.Y. (2)
9. Colo. (2)
10. Conn. (3)
11. N.Y. (1)
12. Alaska (1), Colo. (1), Conn. (1), Del. (1), Fla. (1), Ill. (1), Tex. (1)
13. D.C. (5), Md. (1).
14. Fla. (25), Va. (2)
15. Idaho (2)
16. Ky. (1), Ill. (8), Va. (1)
17. Ind. (2)
18. Kan. (7), Ky. (1), Mich. (1)
19. N.Y. (1)
20. N.Y. (2)

Ky. (1951-89)	(4)	3	0	5[21]	0	1[22]	9
La. (1968-91)	(7)	7	2	3[23]	0	0	12
Me. (1989)	(1)	1	0	0	0	0	1
Md. (1965-91)	(15)	13	8	7[24]	2[25]	2[26]	32
Mass. (1982-89)	(12)	16	3	17[27]	1[28]	1[29]	38
Mich. (1972-89)	(11)	13	4	8[30]	1[31]	0	26
Minn. (1951-88)	(7)	6	1	0	1[32]	2[33]	10
Miss. (1978-88)	(5)	3	0	2[34]	0	0	5
Mo. (1958-81)	(2)	2	1	5[35]	0	0	8
Mont. (-)	(0)	0	0	0	0	0	0
Neb. (1968-88)	(5)	4	0	2[36]	0	0	6
Nev. (1971-89)	(2)	2	0	0	0	2[37]	4
N.H. (1971-85)	(4)	1	4	2[38]	0	5[39]	12
N.J. (1940-86)	(37)	48	5	16[40]	16[41]	32[42]	117
N.M. (1983-89)	(2)	1	1	2[43]	0	1[44]	5
N.Y. (1948-90)	(73)	26	13	57[45]	20[46]	34[47]	150
N.C. (1979-87)	(3)	2	2	2[48]	0	0	6

21. Conn. (1), Fla. (1), Ky. (3)
22. N.Y. (1)
23. La. (2), Wis. (1)
24. Md. (7)
25. N.Y. (2)
26. N.Y. (2)
27. Cal. (1), Mass. (13), Mich. (1); Va. (1), Vt. (1)
28. N.Y. (1)
29. N.Y. (1)
30. Mich. (8)
31. N.Y. (1)
32. N.Y. (1)
33. N.Y. (2)
34. Miss. (2)
35. Ala. (1), Ariz (1), N.Y. (1), Tex. (1), Va. (1)
36. La. (2)
37. N.Y. (2)
38. Mich. (1), N.H. (1)
39. Chicago (1); N.Y. (4)
40. Mich. (7); Miss. (1), Mo. (4), N.J. (3), Wash. (1)
41. N.Y. (16)
42. N.Y. (32)
43. Mo. (1), Wis. (1)
44. N.Y. (1)
45. Ala. (1), Alaska (2), Cal. (1), Colo. (1), D.C. (1), Ga. (1), Idaho (1), Ill. (1), Me. (1), Mass. (2), Mich. (4), N.Y. (40), Wash. (1)
46. La. (1), N.Y. (16), Nassau (3)
47. Brooklyn (1), Chicago (1), Milwaukee (1), N.Y. (31)
48. N.C. (2)

N.D. (1976-80)	(2)	1	1	0	0	0	2
Ohio (1964-89)	(9)	6	5	10[49]	0	0	21
Okla. (1973-88)	(8)	2	1	7[50]	3[51]	0	13
Ore. (1958-88)	(43)	11	4	42[52]	5[53]	8[54]	70
Pa. (1969-84)	(13)	8	8	0	0	0	16
R.I. (1970-83)	(2)	2	0	0	0	0	2
S.C. (1976-88)	(3)	4	1	0	0	0	5
S.D. (1988)	(1)	0	1	0	0	0	1
Tenn. (1965-87)	(5)	2	1	1[55]	2[56]	1[57]	7
Tex. (1967-90)	(15)	1	1	12[58]	3[59]	1[60]	18
Utah (1983)	(1)	1	0	0	0	0	1
Vt. (-)	(0)	0	0	0	0	0	0
Va. (1986-89)	(2)	1	1	0	0	0	2
V.I. (-)	(0)	0	0	0	0	0	0
Wash. (1963-89)	(15)	13	3	8[61]	7[62]	5[63]	36
W. Va. (1970-90)	(4)	0	2	2[64]	0	0	4
Wis. (1963-90)	(9)	3	1	6[65]	0	0	10
Wyo. (-)	(0)	0	0	0	0	0	0
TOTAL	468	283	103	322	65	104	877

49. Conn. (1), Md. (1), Mich. (1), N.Y. (1), Ohio (6)
50. Mich. (1), Okla. (6)
51. N.Y. (3)
52. Or. (42)
53. N.Y. (5)
54. N.Y. (8)
55. Mich. (1)
56. N.Y. (2)
57. N.Y. (1)
58. Tex. (12)
59. N.Y. (3)
60. N.Y. (1)
61. Ariz. (1), Idaho (1), Mich. (1), Wash. (5)
62. La. (2), N.Y. (5)
63. N.Y. (5)
64. Va. (1), W. Va. (1)
65. Wis. (6).

A Role For "Expert Arbitrators" in Resolving Valuation Issues Before the United States Tax Court: A Remedy to Plaguing Problems

Nina J. Crimm*

One cannot know everything. — Horace

Introduction

As early as the first century B.C., Quintus Horatius Flaccus Horace, the Latin poet, remarked on the impossibility of being an expert in all disciplines. So too, centuries later in the twelfth century A.D., Maimonides acknowledged the truth of Horace's observation when he suggested that differences in opinion can be attributed to four fundamental factors, three of which rest upon the existence or absence of personal knowledge or expertise:

> One of them is love of domination and love of strife . . . . The second cause is the subtlety and the obscurity [also translated as profundity] of the object of apprehension in itself and the difficulty of apprehending it. And the third cause is the ignorance of him who apprehends and his inability to grasp things that [are] possible to apprehend. . . . However, in our times there is a fourth cause. . . . It is habit and upbringing [also translated as education].[1]

Today, many centuries later, the comments of Horace and Maimonides seem almost unremarkable. We take for granted that we might be exposed to many ideas, concepts, techniques, and disciplines, but that we cannot master them all. Ours is an age of expertise, of professionalism reflected and underwritten by our institutions. For instance, the structure of our educational systems illustrates our appreciation of the importance of specialization. We have vocational schools which teach special crafts such as carpentry, welding, and plumbing skills. We have graduate and professional

---

* Professor of Law, St. John's University School of Law. A.B., 1972, Washington University; J.D., 1979, Tulane University School of Law; M.B.A., 1979, Tulane University; LL.M. in Taxation, 1982, Georgetown University Law Center.

1. Moses Maimonides, The Guide of the Perplexed 66-67 (Shlomo Pines trans, Univ. of Chicago Press 1963) (1856-66).

Maimonides attributed the definitions of the first three causes to Alexander of Aphrodisias. The fourth is Maimonides' own idea. Joseph A. Buijs, Maimonides: A Collection of Critical Essays 112 (1988).

schools that teach disciplines such as law, medicine, architecture, engineering, business, and the sciences. Within each of those subject areas, a student can obtain a degree or special certification that acknowledges expertise in a particular specialty. For example, an individual might obtain a Master of Laws in Taxation, or might be board certified in pulminary medicine or pediatrics, or might secure a Ph.D. in electrical or mechanical engineering. The wealth of available disciplines and specialty areas taught in our schools serves as a signal of the complexities and breadth of existing information beyond our abilities to master. Likewise, the structure of our judicial systems acknowledges the "subtlety and the obscurity [or profundity]"[2] of the subjects that the judiciary must address. We have established special federal bankruptcy courts, a federal tax court, federal military law courts, state courts of family law, and state criminal law courts. Judges who serve on each of these courts have particular expertise in the named field of law. Thus, among other institutions, our educational and judicial structures recognize that each subject merits its own exegesis by persons having special knowledge.

By further focusing on the judiciary, we find that it has developed useful systems by which experts may be enlisted to advise the trier of fact of subjects outside the expertise of the judge or jury. Partisan or nonpartisan experts, or both, may be called upon to synthesize and extrapolate facts, to approximate the truth, and to express reasoning and opinions which should enlighten the court. As part of the adversarial process, these systems usually take the form of partisan representation whereby each party employs one or more expert witnesses to present educated reasoning and opinions as to the facts and truths of a case. Influences and benefits of these partisan expert systems might be measured by judges' reliance on the experts' persuasive reasoning and opinions. The tolls extracted by these partisan expert systems might be measured by the attendant biases, frustrations, inefficiencies, and financial penalties.

The purpose of this Article is to measure and address some of the problems and influences that accompany the use of partisan expert witnesses in United States Tax Court (Tax Court) litigation involving valuation issues and to propose a possible remedy to the problems. The Article first gives a brief historical overview of the use of partisan and nonpartisan expert witnesses in litigation. Next, the Article addresses difficulties that have long emanated from the use of partisan expert witnesses at trial. The Article then specifically focuses on the Tax Court and the frustrations that the court has encountered with partisan expert witnesses. By relating the results of the author's empirical study concerning the use of partisan expert witnesses in the Tax Court in certain categories of valuation cases from 1985 through

---

2. MAIMONIDES, *supra* note 1, at 66.

1990, the Article explores the facts behind the court's frustrations. Finally, the Article suggests a possible means of overcoming the afflictions brought about by the Tax Court's current system of permitting the use of multiple partisan expert witnesses during litigation of valuation issues.

I. Historical Background

For centuries, the judiciary has utilized expert witnesses. There are English cases dating back to the fourteenth century in which courts summoned skilled persons for advice. These skilled individuals acted as nonpartisan advisers to the presiding judge or jury when questions of fact arose about which the judge or jury lacked particular knowledge.[3] For example, the courts in several instances called surgeons to advise them of the freshness or permanency of wounds when central to the questions before the courts.[4] In other cases, the courts obtained advice of grammarians to assist in the interpretation of commercial instruments and other documents.[5] Sometimes the court empaneled a special jury of experts to decide questions requiring special knowledge. More recently, but as far back as the seventeenth century, parties to controversies summoned skilled persons to testify to their observations and conclusions drawn therefrom. Typical of such cases were those in which the prosecution in a criminal trial called a physician to testify as to his observations during the autopsy of a deceased individual and to draw conclusions on the probable causes of death.[6]

The need to summon one or more experts to participate in judicial proceedings, either as impartial consultants to the trier of fact or as partisan advisers, arises from the reality that a trier of fact cannot be a "jack of all trades." Often, the trier of fact is asked to intelligently decide issues that depend upon specialized knowledge or experience beyond that of the fact finder.

The modern judiciary and bar have responded to evolving demands and shortcomings by promulgating rules and procedures by which the trier of fact can be advised by experts. For example, today Rule 706 of the Federal Rules of Evidence provides for the appointment of court-selected neutral experts and for the far more common, party-selected partisan appointment of experts.

Even in the Tax Court, which is composed of judges who have tax expertise, the parties often hire and utilize expert witnesses to testify and

---

3. For a history of the use of experts by the courts, see Lloyd L. Rosenthal, *The Development of the Use of Expert Testimony*, 2 Law & Contemp. Probs. 403 (1935).

4. *See, e.g.*, Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 42-43 (1901).

5. *See id.* at 43.

6. *See id.* at 46.

submit reports with respect to factual issues beyond the ken of the judges. Parties to a tax controversy involving the valuation of unique, novel, or difficult-to-value assets routinely utilize one or more expert witnesses to promote asserted values. The Tax Court rules do not impose a restriction on the number of partisan experts that can be utilized for litigation purposes. It is quite common for parties to call upon the services of several experts to value real estate, artwork, partnership interests, and closely held stock.

Although parties frequently utilize expert witnesses, to date there has been no reported case in which a Tax Court judge has chosen to appoint a neutral expert adviser.[7]

II. Problems Arising From Use of Partisan Experts

The literature is replete with discussions of problems attendant to the use of partisan expert witnesses. Theoretically, each expert witness should provide the trier of fact with the *best* considered opinion to diminish the trier's uncertainty on the factual issues at hand. However, in practice, partisan expert witnesses often increase fact-finders' uncertainty because of the conflicting biases experts represent. Partisan expert witnesses are hired to contribute the best observations, reasoning, and opinions to support the hiring party's position. Stated in the extreme, an expert witness can become a party's "hired champion" or "hired gun."

As early as 1876, an English judge expressed discontentment with the partisan expert witness system:

> The mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does some times, to half-a-dozen experts . . . . He takes their honest opinions, he finds three in his favor, and three against him; he says to the three in his favor, 'will you be kind enough to give evidence?' and he pays the three against him their fees and leaves them alone; the other side does the same . . . . I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.[8]

---

7. Rule 706 of the Federal Rules of Evidence, which permits court-appointed experts, presumably should apply to the Tax Court. Rule 101 provides that the Federal Rules of Evidence are applicable to all United States courts. Fed. R. Evid. 101. Moreover, 26 U.S.C. § 7441 (1988) establishes the Tax Court as a court of the United States, and 26 U.S.C. § 7453 (1988) provides that proceedings in the Tax Court will be conducted in accordance to the rules of evidence applicable to nonjury trials in the U.S. District Court of the District of Columbia. *Accord* Tax Ct. R. 143.

8. Thorn v. Worthing Skating Rink Co., (M.R.1876, Aug. 4) (Jessel, M.R.), *quoted in* Plimpton v. Spiller, 6 Ch.D. 412 (1877), *in* Charles T. McCormick, Evidence 35 (1954), and *in* Judge Francis Van Dusen, *A United States District Judge's View of the Impartial Medical Expert System*, 32 F.R.D. 498, 499 (1963).

As long ago as 1858, the United States Supreme Court commented on the biases and inefficiencies flowing from adversaries' attempts to counterbalance one another's use of partisan expert witnesses:

> Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks, are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue.[9]

These fundamental themes have been echoed by the Tax Court on numerous occasions. Not only has the Tax Court expressed its concern that "experts may lose their usefulness and credibility when they merely become advocates for one side,"[10] but the court has repeatedly admonished the parties for using court time to resolve valuation disputes rather than settling or employing other procedures to avoid court proceedings.[11] Judge Theodore Tannenwald, Jr. articulated one particularly forceful expression of these sentiments in *Buffalo Tool and Die Manufacturing Co. v. Commissioner*:[12]

> As the Court repeatedly admonished counsel at trial, the issue is more properly suited for the give and take of the settlement process than adjudication. See *Messing v. Commissioner*, 48 T.C. at 512. The existing record reeks of stubbornness rather than flexibility on the part of both parties based upon 'an overzealous effort . . . to infuse a talismanic precision' into their respective views as to valuation. See *Messing v. Commissioner*, 48 T.C. at 512. We are convinced that the valuation issue is capable of resolution by the parties themselves through an agreement which will reflect a compromise Solomon-like adjustment, thereby saving the expenditure of time, effort, and money by the parties and the Court—a process not likely to produce a better result. Indeed, each of the parties should keep in mind that, in the final analysis, the Court may find the evidence of valuation by one of the parties sufficiently more convincing than that of the other party, so that the final result will produce a significant financial defeat for one or the other, rather than a middle-of-the-road compromise which we sus-

---

9. Winans v. New York & Erie R.R. Co., 62 U.S. 88, 101 (1858).

10. Estate of Halas, Sr. v. Commissioner, 94 T.C. 570, 577 (1990).

11. *See, e.g.*, Estate of Gilford v. Commissioner, 88 T.C. 38, 62 (1987); Symington v. Commissioner, 87 T.C. 892, 904-05 (1986); Buffalo Tool & Die Mfg. Co. v. Commissioner, 74 T.C. 441 (1980); Messing v. Commissioner, 48 T.C. 502, 512 (1967).

12. 74 T.C. 441 (1980).

> pect each of the parties expects the Court to reach. If the parties insist on our valuing any or all of the assets, we will. We do not intend to avoid our responsibilities but instead seek to administer to them more efficiently—a factor which has become increasingly important in light of the constantly expanding workload of the Court.[13]

Thus, the adversarial use of partisan expert witnesses allegedly to aid in the resolution of factual issues beyond the expertise of the trier of fact may indeed serve as a double-edged sword that creates as many or more problems than it solves.

III. Empirical Study

A. Background and Methodology

The words of Judge Tannenwald inspired me to empirically study the use of partisan qualified expert witnesses in various categories of valuation cases before the Tax Court.[14] Specifically, I began the study by reading all (in excess of 220) Tax Court opinions and memorandum opinions that involved a valuation issue and were issued during the period of 1985 through 1990. I then chose to focus on cases concerning issues involving either an Internal Revenue Code (I.R.C.) section 183 question,[15] the valuation of estates, gifts, charitable contributions, or reasonableness of compensation. From those opinions and memorandum opinions, I excluded several cases from the study either because the parties did not utilize expert witnesses for the valuation issue, or because the Tax Court rejected all proffered expert witnesses as unqualified. From the remaining opinions and memorandum opinions, which totalled 184 for the six-year period, I collected information on the frequency of parties' usage of multiple expert witnesses in valuation cases, the frequency that the Tax Court's decision on the

---

13. *Id.* at 451-52.

14. A case involving a valuation issue is a dispute over the proper fair market value of an asset or assets. For example, assets may need valuation for federal tax purposes with respect to cases involving a decedent's estate; a tax shelter with respect to which the IRS challenges the taxpayer's profit-motive and/or deductions claimed; a commodity straddle; a liquidated business; a charitable contribution; reasonable compensation; or I.R.C. § 482 (1988) (under which the Internal Revenue Service has authority to allocate the value of certain assets among businesses owned and controlled by the same persons).

15. The category of cases involving an I.R.C. § 183 question involves a valuation type issue. The statute requires a taxpayer to have a profit motive in order to be allowed credits or deductions claimed from tax shelter arrangements. I.R.C. § 183 (1988). This profit-motive determination is made based upon consideration of the worth of the investment and the amount that the taxpayer paid for the investment. For further discussion, see *infra* Part IV.B.

valuation issue coincided with the valuation posed by one party's expert witness, and the frequency that the Tax Court's decision reflected "a middle-of-the-road compromise" between the valuations posed by the parties' expert witnesses. One purpose in obtaining this information was to consider empirically two of Judge Tannenwald's comments from *Buffalo Tool & Die Manufacturing Co.*:

> (1) the opportunity for significant financial defeat of one party arises frequently when valuation issues are litigated in the Tax Court;
>
> (2) the parties might be well advised to consider resolution of valuation disputes by some means other than trial before a judge of the Tax Court.

B. Findings and Analysis

As one might expect, it was rare to find a valuation case within the selected categories in which both the taxpayer and the Internal Revenue Service (IRS) did not utilize at least one expert witness. In an occasional case, one party employed at least one qualified expert witness for valuation purposes while the other party used none. Surprisingly, in those cases in which one party chose not to utilize any expert witness, the party without the expert was as often the IRS as the taxpayer. In the overwhelming number of cases, the IRS and the taxpayer each called one or more qualified expert witnesses for valuation purposes. Most often one party utilized one expert witness, while the other party utilized multiple expert witnesses. As table 1 below indicates, in a substantial number and percentage of the cases studied, one or both parties employed multiple expert witnesses.

Table 1

(1) Taxable Year	(2) Number of cases in which one or both parties utilized multiple expert witnesses	(3) Total number of cases in study	(4) Percentage of total cases with 1 or both parties using multiple expert witnesses
1985	15	30	50.0%
1986	16	33	48.5%
1987	18	32	56.3%
1988	13	33	39.4%
1989	14	32	43.8%
1990	11	24	45.8%
	87	184	47.3%

When a party utilized multiple expert witnesses, usually two experts were used; however, it was not uncommon to find a party who employed three expert witnesses.[16] Sometimes a party utilized the services of four or five expert witnesses.[17] In no case did the number of experts used by a single party exceed five.

In looking for patterns, taking the six-year period as a whole, one finds the data reveals that taxpayers chose to employ multiple expert witnesses more often than did the IRS. Yet, as tables 2 and 3 below indicate, in comparing the percentage of cases in a given year in which the taxpayer used multiple expert witnesses for valuation purposes to the percentage of cases in which the IRS utilized multiple expert witnesses for the same purpose, there often was significant variation.[18]

Table 2

(1) Taxable year	(2) Total number of cases in study	(3) Number of cases in study in which taxpayer used multiple expert witnesses	(4) Percentage of cases in study in which the taxpayer used multiple expert witnesses
1985	30	9	30.0%
1986	33	14	42.4%
1987	32	5	15.6%
1988	33	7	21.2%
1989	32	11	34.4%
1990	24	11	45.8%
	184	57	31.0%

16. For the entire six-year period, there were twenty cases in which one party used three expert witnesses. In one of those cases, both parties utilized three experts.

17. For the entire six-year period, there were five cases in which one or both parties utilized four and five expert witnesses.

18. Note that the total combined number of cases in table 2, column 3 and column 3 of table 3 exceeds the total number of cases in column 2 of table 1. The reason for the difference is attributable to the fact that in some cases, both parties utilized multiple expert witnesses. This overlap occurred as follows: 1985 = 3 cases; 1986 = 7 cases; 1987 = 1 case; 1988 = 2 cases; 1989 = 3 cases; and 1990 = 4 cases.

Table 3

(1) Taxable year	(2) Total number of cases in study	(3) Number of cases in study in which IRS used multiple expert witnesses	(4) Percentage of cases in study in which IRS used multiple expert witnesses
1985	30	10	33.3%
1986	33	9	27.3%
1987	32	13	40.6%
1988	33	9	27.3%
1989	32	4	12.5%
1990	24	4	16.7%
	184	49	26.6%

This data indicate that the parties utilized multiple expert witnesses in a significant percentage of the valuation cases decided by the Tax Court from 1985 through 1990. There are no means of determining from the data whether the usage of multiple witnesses in valuation cases played a direct role in delaying the court's disposition of cases.[19]

Although there might be an expectation that the larger the amount of taxes in dispute, the more numerous the partisan expert witnesses employed, the data did not demonstrate such a correlation. Additionally, there was no apparent relationship between the type of valuation case—whether estate

---

19. There are no direct data to support the supposition that the use of numerous partisan expert witnesses in litigation before the Tax Court may be a contributing factor to the court's overcrowded docket and to delays in the disposition of cases. However, as intimated by Judge Tannenwald in *Buffalo Tool & Die Mfg. Co.*, one can surmise that the greater the number of expert witnesses called at trial to testify, the likelihood increases for lengthier trial proceedings. Buffalo Tool & Die Mfg. Co. v. Commissioner, 74 T.C. 441, 451-52 (1980). It also follows that the greater the number of partisan expert witnesses, the more numerous the expert reports (as required by Tax Court Rule 143(f)(1), discussed below) and the greater amount of testimony through which the presiding judge must sift in order to make a determination in a case.

Tax Court Rule 143(f)(1) provides that unless otherwise permitted by the court, "any party who calls an expert witness shall cause that witness to prepare a written report for submission to the Court and the opposing party" no later than 30 days before the call of the trial calendar on which the case appears. TAX CT. R. 143(f)(1). Tax Court Rule 143(f)(2) states that the "court ordinarily will not grant a request to permit an expert witness to testify without a written report where the expert witness' testimony is based on third-party contacts, comparable sales, statistical data, or other detailed, technical information." TAX CT. R. 143(f)(2). Finally, the rule indicates that there are circumstances in which the transcript of a deposition of an expert witness may serve as the expert's report. TAX CT. R. 143(f)(3) (referring to TAX CT. R. 76(e)(1), paragraph 1).

valuation, charitable donation valuation, etc.—and the number of expert witnesses employed by the parties.

As part of the study, I collected data on the valuation suggested by each expert witness if stated in the Tax Court's opinion or memorandum opinion. Additionally, I maintained a record of the final valuation the Tax Court determined appropriate in those cases in which the determination was made.[20] A comparison of the Tax Court's determination with the suggested valuations of the expert witnesses reveals, as shown in table 4 below, that for taxable years 1985 through 1990 the Tax Court's determination coincided with a single expert's suggested valuation in a substantial percentage of the cases.

Table 4

(1) Taxable year	(2) Total number of cases in study	(3) Number of cases in which court's determination coincided with one expert witness	(4) Percentage of cases in which court's determination coincided with a single expert witness
1985	30	12	40.0%
1986	33	8	24.2%
1987	32	13	40.6%
1988	33	8	24.2%
1989	32	10	31.3%
1990	24	13	54.2%
	184	64	34.8%

20. In a number of cases, the Tax Court did not determine a specific dollar amount for valuation purposes. This occurred exclusively in I.R.C. § 183-type cases, in which the issue generally is whether a transaction was profit motivated. In that category of cases, the court often found that determining an exact dollar amount was unnecessary if it could determine a generally appropriate fair market value range. *See* table 7 *infra* p. 53.

Of those cases in which the court's determination coincided with a single expert witness's suggested valuation, more often than not, the court's determination matched the suggested valuation of a witness who testified on behalf of the IRS. This is demonstrated in tables 5 and 6 below.

Table 5

(1) Taxable year	(2) Number of cases in which court's determination coincided with a single expert witness	(3) When valuation coincided, number of cases in which court's determination coincided with taxpayer's expert witness	(4) When valuations coincided, percentage of court's valuation determinations which coincided with taxpayer's expert witness
1985	12	5	41.7%
1986	8	1	12.5%
1987	13	3	23.1%
1988	8	3	37.5%
1989	10	5	50.0%
1990	13	4	30.8%
	64	21	32.8%

Table 6

(1) Taxable year	(2) Number of cases in study in which court's determination coincided with a single expert witness	(3) When valuation coincided, number of cases in which court's determination coincided with IRS's expert witness	(4) When valuations coincided, percentage of court's valuation determinations coincided with IRS's expert witness
1985	12	7	58.3%
1986	8	7	87.5%
1987	13	10	76.9%
1988	8	5	62.5%
1989	10	5	50.0%
1990	13	9	69.2%
	64	43	67.2%

Therefore, as did Judge Tannenwald in *Buffalo Tool*,[21] tables 5 and 6

21. 74 T.C. 441, 451-52 (1980); *see supra* notes 11-13 and accompanying text.

indicate that the opportunity for significant financial defeat of one party arose frequently when valuation issues were litigated in the Tax Court. Furthermore, more often than not, the economic blow was to the taxpayer. On occasion the opinion explained the reason for this outcome. For example, sometimes the presiding judge considered the position of the IRS in the case to have been stronger, more convincing, or more reasonable. Other times, the presiding judge viewed the taxpayer's expert witnesses as less credible or less reliable, or their opinions and reports to be unjustified or less useful than those of the IRS's experts. Although mere conjecture, other reasons for the rather high incident of correlation between a valuation suggested by an expert witness for the IRS and the final determination of the Tax Court might be submitted. For instance, for many cases the IRS chooses not to settle before litigation, the IRS has a strong position that is represented by one or more expert witnesses long familiar to the court as credible, accurate in valuation matters generally, and thorough in research efforts. Another reason for the correlation could be attributable to the fact that in most cases, the taxpayer has the burden of proof. Regardless of the reason, the "Solomon-like" pronouncements of the Tax Court in the studied valuation cases most often spelled financial defeat for the taxpayer rather than for the IRS.

For issues in which the presiding judge did not adopt the exact valuation amount suggested by any expert witness, most of the valuation amounts finally determined by the judge were closer to the figure suggested by the IRS's expert witness than by the taxpayer's expert.[22] This observation suggests that the court often did not take a "middle-of-the-road" compromise approach. Yet, again, even if there was not an uncompromised victor in the dispute, the IRS position tended to prevail. Finally, in fewer than ten cases during the six-year period, the presiding judge totally discarded the valuation approaches and suggested amounts of all expert witnesses in a case. The stated explanations for this action included the lack of credibility of all experts, pervasive inaccuracies in reports, and unreliability of all valuation approaches presented by all experts. In these few situations, the presiding judge independently formulated the appropriate valuation approach or amount, or both.

In a number of cases, the Tax Court did not determine a specific dollar amount for valuation purposes. This occurred exclusively in I.R.C. section 183-type cases, in which the issue generally concerned whether a taxpayer's transaction was profit motivated. For example, the court used this approach when taxpayers claimed investment tax credits, depreciation deductions or business expense deductions with respect to their

---

22. *See infra* Appendix A.

investments in such tax shelters as master recordings, movies, or videotapes. In the I.R.C. section 183 category of cases, the court often found that determining an exact dollar amount was unnecessary if it could determine by estimated dollar ranges that the taxpayer had entered the transaction either with a profit motive, or, conversely, without the requisite profit motive. In essence, the court compared the approximate fair market value of the assets in the tax shelter at the time of the taxpayer's investment to the actual price paid by the taxpayer for the investment interest. This comparison enabled the presiding judge to determine whether the transaction had economic substance or whether the taxpayer paid an excessively inflated price for the investment. An excessively high purchase price indicated that the investment lacked economic substance, the taxpayer had no profit motive, and was primarily motivated by tax consequences (e.g., a higher basis, larger depreciation deductions).

An analysis of these I.R.C. section 183-type cases from 1985 through 1990 reveals that most often the court held that the taxpayer did not have the requisite profit motive and found in favor of the IRS. In fact, as shown in tables 7 and 8 below, depending upon the particular taxable year at issue, between sixty-six percent and 100% of the Tax Court's decisions were favorable to the IRS.

Table 7

(1) Taxable year	(2) Total number of § 183-type cases in which no exact value determined by court	(3) Number of § 183-type cases favorable to the taxpayer	(4) Percentage of § 183-type cases without exact value determination and with decision favorable to taxpayer
1985	3	0	0%
1986	0	N/A	N/A
1987	10	2	20.0%
1988	12	1	8.3%
1989	6	1	16.7%
1990	3	1	33.3%
	34	5	14.7%

Table 8

(1) Taxable Year	(2) Total number of §183-type cases in which no exact value determined by court	(3) Number of § 183-type cases favorable to IRS	(4) Percentage of § 183-type cases without exact value determination and with decision favorable to IRS
1985	3	3	100.0%
1986	0	N/A	N/A
1987	10	8	80.0%
1988	12	11	91.7%
1989	6	5	83.3%
1990	3	2	66.7%
	34	29	85.3%

Therefore, the doomsday prediction of Judge Tannenwald in *Buffalo Tool* again proves correct; the opportunity for significant financial defeat of one party arises frequently when valuation issues are litigated in the Tax Court. In I.R.C. section 183-type cases, most often the IRS was the victor, while the taxpayer was the financial loser.[23]

IV. Resolution of Problems Attributable to Use of Partisan Experts

A. Problems Needing Resolution

My empirical study confirms that there is factual basis to the expressed frustrations and concerns of Judge Tannenwald in *Buffalo Tool.*[24] The data clearly indicate that litigation of valuation issues in the Tax Court often resulted in significant financial defeat to the taxpayers. Fees paid to attorneys and expert witnesses throughout the litigation process also must be accounted for in considering the extent of the taxpayers' financial burdens. Because the parties, and especially taxpayers, incur significant financial burdens when litigating tax controversies, they may be well advised to consider resolution of valuation disputes by some means other than a trial before a Tax Court judge. Because the taxpayer has the choice of forum, the taxpayer may wish to consider another

23. *Id.*
24. *Id.*

forum—the appropriate federal district court or the Claims Court.[25] However, there are no assurances that the outcome of litigation in either of those two forums would produce more advantageous results for a taxpayer. Alternative possible approaches exist. Taxpayers might want to consider settlement of the valuation issues, or, as I propose below, they might agree to voluntary binding arbitration in front of an "expert arbitrator." The Tax Court might be influential in steering the parties to accept either of these two alternatives. However, if instead the parties decide to litigate a valuation matter in the Tax Court, there are two avenues of relief for the court. First, the Tax Court might consider modifying its rules so as to limit the number of partisan expert witnesses that may be utilized by each party in valuation cases. Although on first blush this suggestion might be appealing, it would be problematic in its fairness. Second, and perhaps a more attractive alternative, the presiding judge might consider appointing a neutral nonpartisan valuation expert as an adviser.

B. Court-Appointed Experts

Many leading authorities and commentators have recommended the use of neutral court-appointed experts as a means of remedying the problems that arise from the prevailing use of partisan expert witnesses.[26] Several years ago, two commentators proposed the utilization of court-appointed expert witnesses in valuation cases before the Tax Court.[27] Although the Tax Court has the authority to appoint nonpartisan expert witnesses,[28] to date the Tax Court has not utilized its power to appoint a neutral expert witness. Numerous explanations could be ventured, including the lack of established procedural mechanisms; a belief by

---

25. For a recent article on choice of forum in tax controversies, see Nina J. Crimm, *Tax Controversies: Choice of Forum*, 9 B.U. J. TAX LAW 1 (Nov. 1991).

26. *See, e.g.*, CHARLES T. MCCORMICK, EVIDENCE 35-38 (1954); 2 JOHN H. WIGMORE, EVIDENCE § 563; Hand, *supra* note 4, at 56; Roger A. Pies and David J. Fischer, *Why Not Court Appointed Experts?*, 40 TAX NOTES 303 (July 18, 1988); Van Dusen, *supra* note 8, at 498.

27. Pies and Fischer, *supra* note 26.

28. Pursuant to Rule 706(a) of the Federal Rules of Evidence, a United States court may appoint expert witnesses agreed to by the parties or of its own selection. FED. R. EVID. 706(a). The Federal Rules of Evidence are applicable to the Tax Court pursuant to I.R.C. § 7453 (1988) and TAX CT. R. 143(a). *See* Holland v. Commissioner, 835 F.2d 675 (6th Cir. 1987), in which the taxpayer complained that the Tax Court did not follow the requirements of Rule 706 in acquiring a court-appointed handwriting expert. *Id.* The Sixth Circuit found that the Tax Court did not appoint an expert witness, but rather suggested that the Internal Revenue Service call a handwriting expert. *Id.* The appellate court apparently recognized the authority of the Tax Court to appoint an expert witness. *Id.*

presiding judges that they should not be actively involved in recruiting even nonpartisan expert witnesses; and uncertainty over means to assess the expert's costs against the parties.[29]

C. Voluntary Binding Arbitration

1. Tax Court Rule 124.—In 1989, the Tax Court adopted Tax Court Rule 124, which permits parties to file jointly a motion that any factual issue in dispute be resolved through court-supervised voluntary binding arbitration.[30] To date, the rule has not been utilized for the arbitration of tax controversies involving a valuation issue. There are some basic procedures and minimum requirements established by Rule 124 for its use. The rule addresses the obligations and duties of the parties and the court only; it does not speak to the procedures and standards to be utilized by the arbitrator.

In accordance with Rule 124, the parties may move for binding arbitration at any time after the case is deemed at issue under Tax Court Rule 38 and before trial.[31] Upon receipt of the motion, the Chief Judge will assign the case to a judge or special trial judge for disposition of the motion and supervision of the arbitration.[32] The procedure required by the rule requires that both parties or their counsel execute a stipulation that specifies:

(1) A statement of the issues to be resolved by arbitration;
(2) The agreement of the parties to be bound by the findings of the arbitrator;

---

29. As to the assessment of costs for an expert, see FED. R. EVID. 706(b); United States v. Means, 858 F.2d 404 (D.C. Cir. 1988); United States Marshal Serv. v. Means, 724 F.2d 642 (5th Cir. 1983), *aff'd on reh'g*, 741 F.2d 1053 (8th Cir. 1984); United States v. R.J. Reynolds, 416 F. Supp. 313 (D.N.J. 1976); United States *ex. rel.* T.V.A. v. 109 Acres of Land, 404 F. Supp. 1392 (E.D. Tenn. 1975); Pies and Fischer, *supra* note 25, at 307.

30. The Official Note to Tax Court Rule 124, indicates that the court considers voluntary binding arbitration particularly appropriate in valuation cases. TAX CT. R. 124 official note [hereinafter Official Note]. Chief Justice Arthur L. Nims remarked that Tax Court Rule 124 is not "intended absolutely to preclude voluntary *non*-binding arbitration." BNA Daily Tax Report, No. 8, S-41 (January 13, 1992) (emphasis added). This also is reflected in the language of the official note to the rule. If permitted, non-binding arbitration would allow an aggrieved party to seek de novo review by the Tax Court even after arbitration. A significant reason for binding arbitration under Tax Court Rule 124 is to reduce litigation before the Tax Court by use of a procedure "short of trial." Official Note, *supra*. One might wonder whether use of non-binding arbitration will effectively undercut one of the critical purposes of the rule.

31. TAX CT. R. 124(a).

32. *Id.*; *see* Official Note, *supra* note 30.

(3) The identity of the arbitrator or the procedure to be used to select the arbitrator;
(4) The manner of compensation of the arbitrator;
(5) A prohibition against ex parte communication with the arbitrator; and
(6) Any other matters considered appropriate by the parties.[33]

This stipulation must be attached to the parties' motion filed with the court.[34]

If the court considers binding arbitration an appropriate route for disposition of the factual matters in controversy, it will appoint an arbitrator by court order.[35] The order also may contain "appropriate" instructions to the arbitrator and to the parties.[36] The arbitrator will formally signify his acceptance of the position and directions of the court order.[37]

After completion of the arbitration process, the parties are obligated to "promptly" report in writing to the court the findings of the arbitrator.[38] Any written report or summary of the arbitrator must be attached to the parties' report.[39] The court will conclude the matter, assuming no other disputes remain in the case, by entering a decision or directing the parties to file a computation under Tax Court Rule 155.[40]

2. Proposal: "Expert Arbitrator."—Nothing in Rule 124 prohibits the selection of a qualified, trained arbitrator who additionally has special expertise in valuing unique, novel, or difficult-to-value assets. Therefore, I propose that parties choose an "expert arbitrator" or panel of arbitrators with at least one member being an "expert arbitrator" to resolve valuation issues. The "expert arbitrator" selected might have special expertise not only in valuing assets similar to those at issue, but also in such particulars as the region in which the real property at issue is located or the artistic periods of the artist who produced the artwork at issue. If the asset at issue is real property, the parties might select an arbitrator who is also a board certified real estate appraiser.

By utilizing an "expert arbitrator," several goals could be attained. This system could save the expenditure of time, effort, and money by the parties and the Tax Court. Tax Court judges would be relieved of

---

33. TAX CT. R. 124(b)(2).
34. TAX CT. R. 124(b)(1).
35. TAX CT. R. 124(b)(3).
36. *Id.*
37. *See* Official Note, *supra* note 30.
38. TAX CT. R. 124(b)(4).
39. *Id.*
40. *See* Official Note, *supra* note 30.

the arduous task of resolving valuation disputes that are capable of resolution only by "Solomon-like" pronouncements. Disputes involving solely valuation issues could be disposed of more rapidly. Judges would be free to turn their attention to other tax controversies before the court — hopefully reducing the Tax Court's enormous case backlog. The use of an "expert arbitrator" might preclude the need for parties to hire and pay one or multiple partisan expert witnesses. This could lower the monetary outlays required of the parties. Finally, an "expert arbitrator" conceivably could reduce the financial defeat now commonly experienced by taxpayers. A nonpartisan "expert arbitrator" system that would operate without the presentation of partisan expert witnesses would preclude the "hired champion" bias syndrome, which otherwise might negatively affect taxpayers' positions.

3. Procedural Questions Remain.—Rule 124 broadly defines the obligations of the parties and the Tax Court. Because "the Rule is not intended to be unduly restrictive or to discourage innovative and imaginative approaches to arbitration,"[41] its flexibility leaves many unanswered procedural questions.

a. Selection of the arbitrator

Rule 124 permits the parties to select an arbitrator. It is silent as to the qualifications required or needed, and it does not require the Tax Court to maintain a list of acceptable arbitrators with or without specialized expertise. Perhaps the best procedure would be for the American Bar Association Section on Taxation to submit a list of possible arbitrators to the Tax Court for its approval. The American Arbitration Association might be a source of names of qualified "expert arbitrators." Parties could be encouraged or required to select an arbitrator from the court's preapproved list in order to expedite the selection process. The list could be updated annually to assure inclusion of appropriate candidates. The list should be divided into categories of asset types. Persons having expertise in real estate appraisal would be listed as qualified to act as an "expert arbitrator" in that area. Likewise, individuals with expertise in appraising artwork might be qualified and listed as a possible "expert arbitrator" for the valuation of art. Because Rule 124 does not require the court to appoint the arbitrator selected by the parties, such a list of preapproved arbitrators would increase the likelihood that the candidate chosen will be appointed and that the appointment will occur quickly.

---

41. *Id.*

b. Form and effect of arbitrator's determination

Rule 124 provides that the "parties shall promptly report to the Court the findings made by the arbitrator and shall attach to their report any written report or summary that the arbitrator may have prepared."[42] The Official Note to Tax Court Rule 124 states that the Tax Court will conclude the arbitrated matter by entering a decision or directing the parties to file a Rule 155 computation.[43] Nothing in the rule or in the Official Note requires the arbitrator to prepare a report giving the reasons for the determination. The lack of a written report by the arbitrator could produce problems, and a procedure should be developed to require the arbitrator to issue a written report.[44] The lack of a written report by the arbitrator could be most deleterious if the parties are able to appeal the portion of the Tax Court decision attributable to arbitration. Without such a written report in the record, it would be difficult for the appellate court to review the determination.

According to I.R.C. section 7482, "decisions of the Tax Court" are reviewable exclusively by the federal circuit courts. Yet, the courts have concluded that not all "decisions" can be appealed. For example, the circuit courts have held that the Tax Court's adoption of a decision stipulated by the parties as a result of settlement should not constitute an appealable decision.[45]

Decisions entered by the Tax Court as a result of the parties entering into voluntary binding arbitration can be distinguished from stipulated decisions. In voluntary binding arbitration, the parties stipulate that they "agree to be bound by the findings of the arbitrator in respect of the issue to be resolved."[46] The purpose of this stipulation is to prevent the parties from subsequently requesting a trial de novo by the Tax Court. The parties are submitting to binding arbitration as a substitute for a trial before a Tax Court judge, and the determination of the arbitrator should supplant a factual determination by a judge that otherwise would be required. The judge must incorporate the arbitrator's findings in the final decision. The effect of the rule

---

42. TAX CT. R. 124(b)(4); *see* Official Note, *supra* note 30.

43. *See* Official Note, *supra* note 30.

44. Tax Court Rule 143(f) requires that in cases heard by a judge of the Tax Court, expert witness reports must be prepared and submitted to the court and to the opposing party for any expert witness to be called to testify. Among other things required in the report are the "witness's opinion and facts or data on which that opinion is based . . . [and] the reasons for the conclusion." TAX CT. R. 143(f)(1). *See supra* discussion in note 19.

45. *See, e.g.*, Clapp v. Commissioner, 875 F.2d 1396, 1398 (9th Cir. 1989); Tapper v. Commissioner, 766 F.2d 401, 403 (9th Cir. 1985).

46. TAX CT. R. 124(b)(2)(B).

is not to have the parties stipulate to the decision, and therefore, a decision entered by the judge that incorporates the findings of an arbitrator is not the equivalent of a stipulated decision. Moreover, unless such decisions are appealable, it is unlikely that many parties will be willing to enter into arbitration, especially when the alternative choice would permit appeal of the presiding judge's decision. Consequently, the judge's decision entered with respect to the arbitrated matter should be appealable.

c. Other procedural subjects

Ideally, the Tax Court should address other procedural issues that might arise. For example, Rule 124 does not address any timing requirements, such as the amount of time that the parties have for producing evidence to the arbitrator, and the arbitrator has for making a determination. The rule does not address whether an "expert arbitrator" may gather facts independently or whether the "expert arbitrator" would be constrained to weigh only evidence as presented by the parties. The rule also does not address whether a panel of arbitrators can be appointed, and if so, whether such a panel could include at least one "expert arbitrator". It also does not suggest rules by which such a panel of arbitrators would operate.

V. Conclusion

As the empirical study confirms, the current system of utilizing partisan expert witnesses during the trial of valuation issues can be deleterious to the Tax Court and to the parties. This system often results in the parties' employing multiple expert witnesses which results in large (and perhaps undue) expenditures of Tax Court and parties' time, effort, and monies. One possible remedy to these problems is the use of either one "expert arbitrator" or a panel of arbitrators with an "expert arbitrator," whose determination would be binding on the parties at the trial level. While this remedy might raise new problems, it would go a long way toward resolving financial and time burdens that have plagued the parties and the Tax Court. Moreover, aside from the tangible benefits that could result from the use of an "expert arbitrator" or panel of arbitrators having an "expert arbitrator," an intangible benefit might result. Taxpayers who agree to utilize an "expert arbitrator" might experience some of the same sentiments expressed by Paul, who, in the New Testament, stated to King Agrippa after being accused of offenses that he claimed to have not committed:

> I consider myself fortunate, King Agrippa, that it is before you that I am to make my defence today upon all the charges

brought against me . . ., particularly as you are expert in all . . . [these] matters . . . . And therefore, I beg you to give me a patient hearing.[47]

---

47. *Acts* 2:3.

Appendix A

On Issue By Issue Basis, Court's Determination As Compared With Experts' Suggested Valuations When Conflicting*

(1) Taxable Year	(2) Author's Assigned Issue Number**	(3) Valuation Suggested by Taxpayer's Experts	(4) Valuation Suggested by IRS's Expert	(5) Court's Determination
1985	1	$ 94,000	$ 53,500	$ 55,278
	2	$3,093/share	$14,604/share	$3,480/share
	3	$ 8,300,000	$ 2,490,000	$ 8,193,000
	4	$ 9,509	$ 2,377	$ 2,641
	5	$ 1,900	$ 577	$ 380
	6	$ 161,915	$ 16,941	$ 18,934
	7	$ 49,700	$ 18,408	$ 10,971
	8	$ 15,200	$ 2,212	$ 5,678
	9	$ 10,415	$ 3,158	$ 4,500
	10	$ 75,000	$ 1,080	$ 65,000
	11	$3.68-$5.02/share	$45.13-$49.25/share	$25.65-$26.35/share
	12	$ 4,380	$ 600	$ 1,000
	13	$ 8,294	$ 750	$ 4,000
	14	$ 2,200	$ 5,000	$ 4,000
	15	$ 474,000	$ 671,500	$ 632,000
	16	$ 3,363,363	$ 6,300,000	$ 3,933,181
1986	17	$ 78,000	$ 79,000	$ 80,000
	18	$ 550,000	$ 1,265,000	$ 726,122
	19	$58.80/share	$454.99/share	$389.37/share
	20	$ 6,704,040	$ 1,100,000	$ 4,970,000
	21	$ 150,000	$ 111,657	$ 92,370
	22	$415,000-$579,000	$85,000-$172,000	$220,625-$431,500
	23	$750/acre	$1050/acre	$975/acre
	24	$ 15,603	$ 900	$ 10,059
	25	$ 540,185	$ 100,000	$ 140,000
	26	$ 50,000	$ 35,000	$ 40,000
	27	$ 135,360	$ 50,000	$ 62,000
	28	$ 750,000	$ 275,000	$ 600,000
	29	$ 217,320	$ 450,000	$ 445,507
	30	$ 220,000	$ 37,000	$ 60,000
	31	$ 264,000	$ 1,278,132	$ 509,250
	32	$ 4,402,545	$39,500,000	$31,200,000

* When more than one expert witness for a party suggested a valuation, the author has chosen to report the suggested valuation closest to the court's determination.

** If a case involved multiple valuation issues, for purposes of this summary only, the author assigned a separate valuation issues number.

	33	$ 261,746	$ 457,890	$ 322,371
	34	$ 236,752	$ 0	$ 90,956
	35	$11,900,000	$12,000,000	$12,170,000
1987	36	$7.35/share	$24.00/share	$7.58/share
	37	$ 6,120,000	$21,000,000	$ 7,304,664
	38	$ 929,000	$ 1,225,000	$ 657,195
	39	$ 525,000	$ 700,000	$ 570,887
	40	$ 60,000	$ 20,000	$ 35,000
	41	$ 80,000	$ 25,000	$ 40,000
	42	$40.35/share	$81.48/share	$72.42/share
1988	43	$ 30,000	$ 5,000	$ 15,000
	44	$ 175,000	$ 72,500	$ 110,000
	45	$ 239,125	$ 150,000	$ 168,700
	46	$ 750,000	$ 350,000	$ 514,650
	47	$ 500,000	$ 60,600	$ 130,000
	48	$ 338,000	$ 492,000	$ 484,000
	49	$ 70,000	$ 86,000	$ 80,500
	50	$ 48,250	$ 63,500	$ 60,500
	51	$ 320,000	$ 1,873,500	$ 1,000,000
	52	$ 237,600	$ 400,000	$ 244,304
	53	$10.00/share	$24.75/share	$12.97/share
	54	$ 463,000	$ 30,000	$ 28,702
	55	$ 50,000	$ 279,679	$ 270,179
	56	$ 2,500,000	$ 479,732	$ 3,000,000
	57	$ 27,850	$ 2,135	$ 11,751
1989	58	$ 145,000	$ 35,000	$ 95,000
	59	$ 37,000	$ 14,500	$ 10,433
	60	$ 35,000	$ 12,000	$ 10,783
	61	$ 35,000	$ 10,500	$ 10,610
	62	$312.00/share	$556.00/share	$475.06/share
	63	$ 9,500	$ 6,000	$ 6,750
	64	$ 200,000	$ 110,000	$ 175,000
	65	$3,800/item	$1,239/item	$1,981/item
	66	$ 750,000	$ 260,000	$ 538,000
	67	$ 682,000	$ 1,600,379	$ 1,404,213
	68	$ 42,000	$ 61,400	$ 50,000
	69	$ 51,800	$ 83,000	$ 66,600
	70	$ 42,200	$ 42,300	$ 39,800
	71	$ 25,000	$ 53,300	$ 45,000
	72	$ 25,000	$ 52,100	$ 45,000
	73	$ 55,000	$ 82,000	$ 78,000
	74	$ 332,700	$ 823,000	$ 465,000
	75	$ 488,250	$ 35,400	$ 32,008
	76	$ 1,207,500	$ 450,000	$ 1,250,000
	77	$ 158,682	$ 0	$ 65,860
	78	$22.43/share	$45.94/share	$37.86/share
	79	$22.43/share	$41.77/share	$25.24/share
	80	$ 1,730,000	$ 1,310,000	$ 1,338,855
	81	$ 1,080,000	$ 735,000	$ 740,677
	82	$ 2,390,000	$ 1,260,000	$ 1,397,897
	83	$11,000,000	$ 8,000,000	$ 9,010,991
	84	$ 1,130,000	$ 994,000	$ 980,025
	85	$ 475,000	$ 147,500	$ 175,000

1990	86	$ 2,000	$ 1,133	$ 1,350
	87	$ 110,000	$ 50,150	$ 103,000
	88	$ 366,583	$ 460,000	$ 153,422
	89	$ 450,000	$ 41,500	$ 100,000
	90	$ 4,362,000	$ 7,400,000	$ 6,381,050
	91	$800/share	$1,636/share	$1,394/share
	92	$43.16/share	$109.00/share	$127.12/share
	93	$ 213,900	$ 340,000	$ 341,000
	94	$423/share	$1,069/share	$825/share

Indiana Law Review

Volume 26 1992 Number 1

NOTES

Curiouser and Curiouser: The United States Supreme Court Continues Its Assault on Federal Habeas Corpus

MICHAEL J. MITCHELL*

INTRODUCTION

Lewis Carroll would have loved federal habeas corpus practice, at least the version that has evolved over the past decade. The author of the splendidly absurd *Alice's Adventures in Wonderland* would have been hard pressed to devise a more befuddling system of rules, tests, and procedures for habeas practice than presently exists. It is a system that the United States Supreme Court seems bent on making "curiouser and curiouser"[1] with each decision concerning the role of federal courts in reviewing state criminal convictions.

During 1991, the Supreme Court decided two cases that added to this confusion and seriously curtailed the availability of federal habeas: *McCleskey v. Zant*[2] and *Coleman v. Thompson*.[3] These cases are but the latest in a series of decisions that demonstrate the Court's efforts to eliminate habeas as a meaningful remedy, a trend noted in legal literature.[4]

---

* J.D. Candidate, 1993, Indiana University School of Law—Indianapolis; A.B., 1973, University of Southern California; M.A., 1978, University of Southern California.

1. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 17 (N.Y., Chanticleer Press 1948) (1865).

2. 111 S. Ct. 1454 (1991).

3. 111 S. Ct. 2546 (1991).

4. *See generally* Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941 (1991); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991); Eric M. Freedman, Habeas Corpus Cases Rewrote the Doctrine, NAT'L L.J., Aug. 19, 1991, at 56.

For the past three years, Congress has debated the need for habeas corpus reform, but has yet to reach a consensus.[5]

This Note will examine the impact of *McCleskey v. Zant*, which severely restricted the availability of second or subsequent federal habeas petitions, and *Coleman v. Thompson*, which all but eliminated federal review of substantive claims that have been ruled defaulted in state courts because of procedural errors. This Note also will discuss the differing approaches to habeas reform being debated in Congress, and argue that the Supreme Court has unilaterally "legislated" a habeas practice so restrictive that unfair results are inevitable.

I. Background

Federal habeas corpus review has served as an important protection of individual liberties for as long as there has been a federal judiciary. In 1789, Congress established habeas corpus as an avenue to remedy violations of rights of persons held under federal authority.[6] When Congress ratified the Fourteenth Amendment to the United States Constitution following the Civil War, it also granted federal courts the power to conduct habeas review of state criminal convictions.[7] In 1948, Congress codified these guarantees when it adopted 28 U.S.C. § 2254, requiring federal courts to hear applications for writs of habeas corpus from persons "in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of the Constitution, or laws or treaties of the United States."[8]

In 1963, the United States Supreme Court decided, in *Fay v. Noia*,[9] that a state prisoner always has access to federal review of his or her conviction unless the petitioner deliberately bypasses the state's appeals process in order to go directly to federal court.[10] *Fay* proved to be the zenith of federal review of state convictions; since then, the Supreme Court has curtailed sharply access to federal habeas.[11]

In June 1988, United States Supreme Court Chief Justice William H. Rehnquist appointed an *ad hoc* committee of the Judicial Conference of

---

5. A conference committee of the 102d Congress attempted to reconcile competing bills passed by the Senate and House. Senate Bill 1241 mirrored the Bush Administration proposals for tight restrictions on habeas review; and House Bill 3371 reflected many competing American Bar Association (ABA) proposals, which seek open access to federal habeas by state prisoners. No bill was ultimately passed by Congress. *See infra* notes 13-15 and accompanying text.

6. The Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82.

7. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

8. 28 U.S.C. § 2254(a) (1948).

9. 372 U.S. 391 (1963).

10. *Id.* at 438-39.

11. *See supra* note 4.

the United States to study what most experts agree has become an unreasonably complex and lengthy process for habeas corpus litigation of death penalty cases. That committee, chaired by former Supreme Court Justice Lewis Powell, issued its report fifteen months later; and Chief Justice Rehnquist forwarded the report to Congress for consideration.[12] Many of the recommendations of the Powell Committee, designed to curtail federal habeas corpus review of state criminal convictions, were included in draft legislation supported by President George Bush and presented to Congress as the Habeas Corpus Reform Act.[13]

At the same time that the Powell Committee was conducting its study, the American Bar Association (ABA) undertook its own investigation of capital habeas litigation, naming a task force co-chaired by Chief Justice Malcolm M. Lucas of the California Supreme Court and Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit.[14] The ABA study produced a set of recommendations that differed greatly with the Bush Administration proposal and generally urged greater access to federal habeas review for state prisoners than did the Bush Administration proposal.[15]

Although both the Bush Administration and ABA proposals agree that federal habeas review needs to be simplified and expedited, they disagree as to how that can best be accomplished. As a result, Congress has grappled with competing approaches, and the debate has divided along partisan political lines. Conservatives tend to support the Administration proposal; congressional liberals tend to support the ABA proposal.

The United States Supreme Court, however, is divided by no such partisan schism. In fact, in recent years, the Court has implemented several of the key Bush Administration proposals on its own initiative. As little as two years ago, habeas corpus "reform" legislation generally meant an attempt to rein in federal review of state criminal convictions. Today, "reform" probably means the attempt to reopen the federal courthouse door.

---

12. Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, report issued September 1989 [hereinafter Powell Committee Report].

13. H.R. 1400, 102d Cong., 1st Sess. (1991) [hereinafter Bush Administration proposal]. Most of the bill's proposals were embodied in Senate Bill 1241, which was approved by the Senate in July 1991.

14. American Bar Association Criminal Justice Section Report to the House of Delegates of the ABA [hereinafter ABA proposal]. Many of the ABA recommendations were incorporated into House Bill 3371, which was approved by the House of Representatives in October 1991. H.R. 3371, 102d Cong., 1st Sess. (1991).

15. *Compare* Bush Administration Proposal, *supra* note 13 and ABA Proposal, *supra* note 14.

II. Successive Petitions and *McCleskey v. Zant*

Under 28 U.S.C. § 2244, a state prisoner "officially" may file a second or subsequent application for habeas corpus based on the discovery of a new factual basis for an appeal, provided the prisoner's attorney made a "reasonably diligent" attempt to discover the new facts before bringing the application.[16] The Supreme Court, however, has interpreted § 2244 narrowly in recent years, all but prohibiting such successive petitions.

The Bush Administration proposal would, essentially, codify recent Supreme Court restrictions. Among other things, the proposal would limit prisoners under capital sentences to one federal habeas petition unless the prisoner could show both a justification for failing to raise the claim on the initial federal petition *and* facts sufficient to "undermine the court's confidence in the determination of *guilt*."[17] The insistence on a strict "guilt" standard is one of the major points of contention between Administration and ABA supporters.

The less-restrictive ABA proposal would permit a person facing the death penalty to bring a successive petition for a new claim upon a showing of some genuine justification for not bringing the claim earlier, or unconstitutional interference with the defense by state officials. The ABA proposal also would require a showing of underlying facts sufficient to cast doubt on either the guilt of the defendant or "the validity of that [capital] sentence under Federal law."[18]

During both the 101st and 102d sessions of Congress, the House of Representatives adopted the ABA proposal over the Bush Administration approach.[19] The Powell Committee recommended a strict "guilt" standard for successive federal petitions; but the full Judicial Conference, which had ordered the Powell Committee study, adopted language similar to the ABA proposal. Thus, the Judicial Conference rejected its own committee's recommendations and urged Congress to adopt legislation permitting the filing of a successive petition when facts indicate innocence or call into question "the appropriateness of the sentence of death."[20]

While Congress debated the matter, the United States Supreme Court, in *McCleskey v. Zant*,[21] determined that successive petitions should be governed largely by the Bush Administration approach; the Court's method, however, was far less direct than either legislative proposal.

---

16. 28 U.S.C. § 2244 (1988).

17. H.R. 1400, 102d Cong., 1st Sess. § 2257(c)(3) (1991) (emphasis added).

18. H.R. 3371, 102d Cong., 1st Sess. § 1106(2)(B) (1991).

19. The Habeas Corpus Revision Act was ultimately deleted from the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified at 18 U.S.C. § 1 nt).

20. H.R. Rep. No. 681, 101st Cong., 2d Sess., pt. 1, at 121 (1990).

21. 111 S. Ct. 1454 (1991).

A. Warren McCleskey's Odyssey Through the Courts

Warren McCleskey was convicted in Georgia under a felony murder statute for taking part in a furniture store robbery in which a police officer was killed. Although he admitted to taking part in the robbery, McCleskey denied being the gunman, and no eyewitness was produced at trial.[22] Of the four persons involved in the robbery, only McCleskey received the death penalty.[23]

Among the key evidence in McCleskey's trial was the testimony by a witness who turned out to be a police informant, a fact that the jury was never told.[24] The defense had difficulty proving the existence of a deal between the witness and the state, until McCleskey's attorneys obtained a copy of a twenty-one-page statement from the witness that had been made to police prior to trial.[25] The attorneys did not receive the statement until long after McCleskey's first federal habeas review.

McCleskey's attorneys, throughout direct appeal, state habeas review, and a first federal habeas petition, argued that the trial judge had wrongly admitted into evidence the testimony of the witness, Offie Evans, who had been placed by police in a jail cell next to McCleskey to obtain evidence against him. Promised by detectives that they would speak to prosecutors on his behalf to obtain a possible lighter sentence for his own criminal acts, Evans engaged McCleskey in conversation, during which McCleskey allegedly admitted the murder.[26] McCleskey, however, steadfastly denied the killing.

McCleskey, through his attorneys, argued that the prosecutor in the case had "deliberately withheld" the informant's statement during discovery, a clear violation of *Brady v. Maryland*.[27] McCleskey also argued that the state had violated his due process rights under *Giglio v. United States*[28] by its failure to disclose an agreement to drop pending escape charges against the informant in return for "his cooperation and testimony."[29] Finally, McCleskey argued a violation of his Sixth Amendment

---

22. *Id.* at 1458.

23. Peter Applebome, *Man Whose Appeals Shook The Courts Faces Execution*, N.Y. TIMES, Sept. 24, 1991, at A18.

24. *McCleskey*, 111 S. Ct. at 1458-59.

25. *Id.* at 1459.

26. *Id.* at 1459-60.

27. 373 U.S. 83 (1963) (holding that suppression by the prosecution of evidence favorable to an accused upon request by the defense violates due process where the evidence is material to guilt or punishment, regardless of good or bad faith on the part of the prosecution).

28. 405 U.S. 150 (1972) (holding that nondisclosure of a promise by the government not to prosecute a witness if he cooperates with the government violates the defendant's due process rights).

29. *McCleskey*, 111 S. Ct. at 1458.

right to counsel under *Massiah v. United States*,[30] claiming that the prosecution, by planting an informant in a cell adjacent to McCleskey, had induced him into making incriminating statements without effective assistance of counsel.[31]

All three constitutional claims were raised in McCleskey's first state habeas appeal, but only the deliberate withholding and due process claims were raised in his first federal petition.[32] None of the theories prevailed, and the United States Supreme Court denied relief on his first federal appeal after granting certiorari to consider a separate line of attack.[33]

McCleskey's attorneys finally learned of the existence of the prosecution witness statement, which confirmed their suspicions of a deal between prosecutors and the witness, through a state open records statute filing.[34] The police and prosecutors had denied the existence of the statement or knowledge of an agreement with the informant until that filing.[35] Atlanta police provided a copy of the twenty-one-page statement to McCleskey's attorneys one month before he filed his second federal petition.[36] Armed with proof that would support their Sixth Amendment claim under *Massiah*, McCleskey's attorneys filed a second federal petition.

The Supreme Court reasoned that because McCleskey himself was present during the jail house conversations, he had actual knowledge of everything contained in the statement and should have known he could pursue a Sixth Amendment claim at the time of his first habeas petition.[37] The Court declared that a prisoner will only be permitted to bring a successive petition when the prisoner was prevented from raising a new claim because of some external force, such as government interference.[38] The Court did not consider the prosecution's denial that it had a deal with the witness to constitute government inference.

---

30. 377 U.S. 201 (1964) (holding that a defendant's Fifth and Sixth Amendment rights are violated by the use of incriminating statements made by the defendant to a co-defendant in the absence of defendant's attorney when the accused did not know that the co-defendant had agreed to cooperate with the prosecution).

31. *McCleskey*, 111 S. Ct. at 1459.

32. *Id.*

33. *Id.* The Court denied relief on a claim by McCleskey that the Georgia death penalty was unconstitutionally applied in that persons who kill whites are far likelier to receive the death penalty that those who kill blacks. McCleskey v. Kemp, 481 U.S. 279 (1987).

34. McCleskey v. Zant, 111 S. Ct. 1454, 1487 n.11 (1991) (Marshall, J., dissenting).

35. *Id.* at 1487 (Marshall, J., dissenting).

36. *Id.* at 1459.

37. *Id.* at 1473.

38. *Id.* at 1470.

Similarly, the significance of a statement from one of McCleskey's jailers that corroborated the existence of a deal between the prosecution and the witness was diminished by the Supreme Court, notwithstanding the fact that the identity of the jailer and his information were not discovered until after the twenty-one-page statement was furnished, reluctantly, to McCleskey's attorneys. The Court reasoned that because the defense did not need the jailer's testimony to raise the *Massiah* claim on the initial federal petition, it could not rely on it for the second.[39]

The Court ignored that, although he knew of his own statements, McCleskey did not know that his cell mate was an informant. The Court insisted that because the twenty-one-page statement was not critical to McCleskey's "notice" of a Sixth Amendment claim under *Massiah*, it did not require re-examination of a lower court decision to dismiss the underlying claim.[40] The Supreme Court affirmed the lower court's denial of relief on McCleskey's second habeas petition,[41] and McCleskey was executed in Georgia on September 25, 1991.[42]

B. Shifting Standards for Successive Petitions

Prior to the Court ruling in *McCleskey v. Zant*, the question of whether a person under state conviction could file a second or subsequent federal habeas corpus petition turned on whether the federal court would consider the later petition to be an "abuse of writ."[43] The grounds for denial of a second or subsequent petition were described in *Sanders v. United States*,[44] as including re-raising issues that had been determined in a prior petition on the merits if "the ends of justice would not be served by reaching the merits" again,[45] or deliberately withholding claims from a first habeas petition so as to "vex, harass, or delay" the federal proceedings.[46]

In *Sanders*, the Supreme Court equated abuse of writ with the "deliberate bypass" of state opportunities to litigate found in *Fay v. Noia*.[47] The result under *Fay* was that any arguably meritorious claim was at least heard in federal court. Thus, abuse of writ was thought

---

39. McCleskey v. Zant, 111 S. Ct. 1454, 1472-73 (1991).
40. *Id.* at 1474.
41. *Id.* at 1475.
42. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A10.
43. 28 U.S.C. § 2254, Rule 9 (1988). *See also* 28 U.S.C. § 2244(b) (1988).
44. 373 U.S. 1 (1963).
45. *Id.* at 15.
46. *Id.* at 18.
47. *Sanders*, 373 U.S. at 18 (citing Fay v. Noia, 372 U.S. 391 (1963)).

to occur only when a prisoner brought an obviously frivolous or repetitive claim and was merely attempting to avoid a final judgment.

The Court in *Sanders* also determined that the government bears the burden of showing abuse of writ.[48] In addition, the Court declared that a petitioner who had omitted a claim from a first federal habeas petition could avoid an abuse of writ charge by demonstrating that they had used "reasonable diligence" to discover the factual predicate of the new claim.[49] In 1977, Congress amended the federal habeas corpus statute and adopted Rule 9(b) of 28 U.S.C. § 2255 "as codifications of the guidelines the Court itself prescribed in *Sanders*."[50]

However, *McCleskey v. Zant* redefined abuse of writ, requiring prisoners who file a second or successive federal petition to satisfy a new, tougher standard, one that had been announced in 1977 for determining whether to excuse procedural defaults. The new test was borrowed from *Wainwright v. Sykes*[51] and requires defendants to demonstrate both a "cause" for failing to raise a new claim earlier, and "prejudice," defined broadly as an unjust result.

The *McCleskey* majority made the leap from the old abuse of writ standard of *Sanders* to the new "cause and prejudice" test of *Sykes* in a two-step process. First, the Court said that deliberate abandonment of a claim was not the only way to abuse the writ.[52] "[A] petitioner may abuse the writ by failing to raise a claim through inexcusable neglect . . . regardless of whether the failure to raise it earlier stemmed from a deliberate choice."[53] Secondly, the Court stated that the "inexcusable neglect standard demands more from a petitioner than the standard of deliberate abandonment."[54]

The Court admitted that it previously offered little guidance to lower courts as to the meaning of "inexcusable neglect."[55] It concluded that "inexcusable neglect" was most like procedural default in that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review."[56] Therefore, "abuse of writ" was equated with procedural

---

48. *Id.* at 17.
49. *Id.*
50. H.R. REP. No. 681, 101st Cong., 2d. Sess., pt. 1, at 119 (1990).
51. 433 U.S. 72 (1977).
52. McCleskey v. Zant, 111 S. Ct. 1454, 1468 (1991).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* The Court cited as significant costs delays in finality of state decisions, burdens to an overworked federal court system, and intentional delay tactics by defendants. *Id.* at 1469.

default and, thus, the "cause and prejudice" test of *Sykes* was imposed for determining whether to permit successive habeas petitions.[57]

The *McCleskey* Court next stated that the "cause" prong of the *Sykes* test required a prisoner "to show that 'some objective factor external to the defense impeded counsel's efforts' to raise the claim in state court."[58] These objective factors, the Court said:

> [I]nclude "interference by officials" that makes compliance with the state's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "ineffective assistance of counsel . . . is cause." Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default.[59]

In utilizing the "cause and prejudice" standard for abuse of writ analysis, the Court ignored the articulated legislative intent of Congress to maintain the *Sanders* "reasonable diligence" standard. The House Judiciary Report on habeas during the 101st Congress[60] addressed the *Sanders* standard and found it insufficient to control successive habeas petitions.[61] The Judiciary Committee approved a habeas bill that would have limited successive habeas petitions for capital defendants, but that bill was not enacted; thus, the *Sanders* standard remains law.[62]

It was not the first time that Congress has considered and rejected attempts to toughen requirements for successive petitions. In 1977, when Congress amended the federal habeas act and enacted Rule 9(b) to codify *Sanders*, Congress deleted language from the rule that would have permitted a federal judge to deny a successive petition if the petitioner's failure to raise the claim initially was seen as "not excusable."[63] The report declared that "the 'not excusable' language created a new and undefined standard that gave a judge too broad a discretion to dismiss a second or successive petition."[64] The fact that the Court side-stepped Congress in the *McCleskey* decision was duly noted by the three-member minority.[65]

---

57. McCleskey v. Zant, 111 S. Ct. 1454, 1470 (1991).

58. *Id.* (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)).

59. *McCleskey*, 111 S. Ct. at 1470 (quoting Murray v. Carrier, 477 U.S. 478, 486-88 (1986) (citations omitted)).

60. H.R. REP. No. 681, 101st Cong., 2d. Sess., pt. 1, at 119 (1990).

61. *Id.*

62. The limits adopted by the Judiciary Report are similar to those included in House Bill 3371 of the 102d Congress and chiefly represent language supported by the ABA. *See supra* notes 14-15 and accompanying text.

63. H.R. REP. No. 1471, 89th Cong., 1st Sess., at 7 (1976).

64. *Id.*

65. McCleskey v. Zant, 111 S. Ct. 1454, 1489 (1991) (Marshall, J., dissenting).

Justice Thurgood Marshall, writing the dissenting opinion in *McCleskey*, declared that the "cause and prejudice" standard imposed by the *McCleskey* majority for abuse of writ "creates a near-irrebuttable presumption that omitted claims are permanently barred."[66] The result, Marshall wrote, would be to encourage frivolous claims because "[r]ather than face the cause-and-prejudice bar, a petitioner will assert all conceivable claims, whether or not these claims reasonably appear to have merit. . . . Far from promoting efficiency, the majority's rule thus invites the very type of 'baseless claims' . . . that the majority seeks to avert."[67]

Once the "cause" prong of the *Sykes* test is satisfied, a petitioner fighting off an abuse of writ claim must show "actual prejudice," which the Court in *McCleskey* did not define aside from making a bare citation to *United States v. Frady*.[68] In *Frady*, a petitioner claimed that a jury instruction given at his trial prejudiced his case. The Supreme Court rejected the claim and said that in order to show "prejudice," the petitioner had to demonstrate "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[69]

In *McCleskey*, the Court found no need to explain "actual prejudice" on the facts of the case because it concluded, astonishingly, that defendant Warren McCleskey had not satisfied the "cause" prong, even though he demonstrated that the prosecution had deliberately withheld evidence it knew would aid him until after McCleskey filed his first federal habeas petition.[70]

Finding that McCleskey had not demonstrated "cause" is all the more surprising in that the majority opinion refers directly to a published legislative interpretation that "newly discovered evidence" constitutes an acceptable excuse for failing to raise a claim earlier.[71] The *McCleskey* majority again used sleight of hand to avoid following the rule it had just acknowledged, by characterizing McCleskey's "new evidence" as somehow not new. The Court said that McCleskey should have known he had a valid Sixth Amendment claim when making his first habeas petition because he was obviously present during his conversation with the jailhouse informant, and knew the content of that conversation. That argument ignores the important distinction that although McCleskey

---

66. *Id.* at 1484-85 (Marshall, J., dissenting).
67. *Id.* at 1485 (citation omitted) (Marshall, J., dissenting).
68. *Id.* at 1470 (quoting United States v. Frady, 456 U.S. 152, 168 (1982)).
69. United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis in original).
70. *McCleskey*, 111 S. Ct. at 1472-73.
71. *Id.* at 1467 (citing 28 U.S.C. § 2254, Rule 9, advisory committee notes, pp. 426-27).

knew the content of his own conversation, he did not know that he was speaking to an informant.

Finally, the Court declared that a successive habeas petition could be maintained, even absent a "cause and prejudice" showing, if the new petition was necessary to correct "a miscarriage of justice."[72] However, the Court defined "miscarriage" as a showing of facts which indicate innocence,[73] the very standard that the Powell Committee recommended for successive petitions, but which both the Supreme Court's own Judicial Council and the ABA rejected as overly harsh.[74]

The Supreme Court did not consider whether the death penalty was inappropriately harsh in McCleskey's case. Two of the jurors from McCleskey's trial, however, did consider whether the death penalty was appropriately applied in McCleskey's case; they concluded it was not.[75] The two jurors told a Georgia Board of Pardons and Paroles hearing that they would not have voted to execute McCleskey had they known that witness Offie Evans was an informant testifying because he had struck a deal with police;[76] but the Pardons Board was unmoved. McCleskey was executed on September 25, 1991, following four eleventh-hour stays of execution, including one in which McCleskey was placed in the electric chair, then removed.[77]

McCleskey's case demonstrates the need for a federal habeas practice that places considerations of justice ahead of arcane procedure and blind deference to state judgments. The ABA proposal is more just than the Bush Administration proposal because it would permit a successive petition when a prisoner discovers new facts that either show innocence or that the sentence was inappropriately harsh.

---

72. *Id.* at 1474.

73. *Id.* at 1474-75.

74. *See supra* note 20 and accompanying text.

75. Peter Applebome, *Man Whose Appeals Shook the Courts Faces Execution*, N.Y. TIMES, Sept. 24, 1991, at A18.

76. *Id.*

77. Peter Applebome, *Georgia Inmate Is Executed After 'Chaotic' Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A10. The Supreme Court not only refused to review Georgia's actions in the McCleskey case, but foreclosed further discussion at the federal level by dismissing the habeas petition, rather than remanding for further hearings consistent with its new test for abuse of writ. In his dissent, Justice Marshall pointed out that when the Supreme Court announces a new rule or test, as it did in *McCleskey*, it usually remands for further consideration in light of its new ruling. *McClesky*, 111 S. Ct. 1454, 1486 (1991) (Marshall, J., dissenting). However, the denial of relief in McCleskey's case simply was affirmed without remand. His attorneys, when filing their first habeas petition, had a reasonable expectation that if they were to later obtain the evidence they needed to raise their Sixth Amendment claim, they would be held to the *Sanders* "reasonable diligence" test, which was clearly satisfied. *Id.*

In explaining its capital habeas reform proposal, which insists that successive petitions demonstrate innocence and not just cast doubt on whether a capital sentence was justified, the Administration wrote:

> The main justification cited for these [ABA 'validity of sentence'] broad exceptions is that the President's bill could permit a guilty death row inmate to be executed even if his death sentence (not his guilty verdict) was based upon perjured testimony which the government had knowledge of [sic]. This ignores the fact that State habeas corpus is available for claims based on newly discovered evidence. It also ignores the States' ability to grant executive clemency.[78]

Whether a state has the "ability" to grant clemency or habeas relief is not the issue. The reason that federal habeas exists at all is that too often states refuse to *actually* exercise reasonable review.[79]

III. Procedural Default and *Coleman v. Thompson*

Two months after handing down its decision in *McCleskey v. Zant*, the United States Supreme Court dealt another resounding defeat for the pro-habeas forces when it announced its decision in *Coleman v. Thompson*.[80] This time, the Court took up the question of whether the default of an entire appeal in state court, based on a state procedural rule, could bar federal review of all issues in the case. The Court also took the opportunity to examine further the extent to which attorney error may be offered as an excuse or "cause" for procedural default. Not surprisingly, the Court further limited the ability of federal district courts and appellate courts to hear habeas claims.

Roger Keith Coleman of Virginia sought to appeal, in federal court, his 1982 capital conviction for the rape and murder of his sister-in-law. At trial, he produced physical evidence which showed that, although his clothes were saturated with coal dust on the night of the crime, no coal dust was found on the victim or in her home.[81] The evidence against him was entirely circumstantial.[82] His two court-appointed lawyers had never handled a capital case before, and Coleman was convicted and sentenced to death. He maintained his innocence throughout his trial, and beyond.

---

78. Open Letter, *An Explanation of President Bush's Capital Habeas Reform Proposal* (obtained through the Office of the Minority Counsel, House Subcommittee on Habeas Corpus Reform) [hereinafter Open Letter].

79. *See infra* notes 143-44 and accompanying text.

80. 111 S. Ct. 2546 (1991).

81. Coleman v. Commonwealth, 307 S.E.2d 864, 868 (Va. 1983).

82. *Id.* at 865.

After the trial, Coleman sought to argue that his attorneys had been ineffective. He raised the ineffectiveness claim during a two-day state habeas hearing; but the Buchanan County Circuit Court ruled against him.[83] Coleman then sought to appeal to the Virginia Supreme Court; but his attorney missed the deadline for filing his notice of appeal by three days.[84] The United States Supreme Court held that the procedural default (missing the filing deadline) barred further review of his case, even his claim of ineffective counsel.[85]

The least surprising aspect of the *Coleman* decision came when the Court finally laid to rest the rule of *Fay v. Noia*,[86] which for many years had been the icon of open federal habeas policy. *Fay* held that a state prisoner who had defaulted his or her entire state appeal by failure to file any appeal could still file a federal habeas petition, unless they deliberately bypassed the state system.[87] The rule of *Fay*, however, has been whittled away by recent decisions, most notably *Wainwright v. Sykes*,[88] which "limited *Fay* to its facts"[89] and imposed the "cause and prejudice" standard for determining whether to excuse procedural defaults.

In *Coleman*, the Court removed the last narrow application of *Fay*, and held that a state prisoner who defaulted his *entire* appeal in state court could not seek federal relief.[90] In unmistakably clear language, the majority declared:

> [B]y filing late, [defendant] Coleman defaulted his entire state collateral appeal. . . . In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[91]

First, it appears that the *Coleman* Court took "fundamental miscarriage of justice" to mean only a showing of factual innocence. The

---

83. *Id.*
84. Coleman v. Thompson, 111 S. Ct. 2546, 2552-53 (1991).
85. *Id.* at 2568.
86. 372 U.S. 391 (1963).
87. *Id.* at 398-99.
88. 433 U.S. 72 (1977).
89. Coleman v. Thompson, 111 S. Ct. 2546, 2563 (1991).
90. *Id.* at 2565.
91. *Id.* at 2564-65.

Court would not consider "miscarriage" to include any mitigating circumstances tending to cast doubt on the validity of a death sentence. Although the Court in *Coleman* did not address the "miscarriage" standard, because defendant Coleman did not raise it,[92] the United States Supreme Court has demonstrated its insistence on a strict innocence standard for "miscarriage" in *McCleskey v. Zant*[93] and in *Harris v. Reed*.[94]

If the *Coleman* decision went no further than to overrule *Fay*, it likely would be little more than a footnote in habeas practice, as the "deliberate bypass" rule of *Fay* has had little vitality in recent years.[95] The Court, however, went a good deal further, and again narrowed the availability of federal habeas by undoing, without saying it was overturning, a key conclusive presumption used by state prisoners to press their federal petitions.

The presumption, announced in *Michigan v. Long*,[96] and expanded to federal habeas cases in *Harris v. Reed*,[97] provided that unless a state appellate court clearly expressed its reliance on an adequate and independent state-law ground when dismissing a petitioner's claim, a federal court could hear the federal claim that had been considered by the state court.[98] The effect of the *Long* and *Harris* "plain statement" presumption was to permit federal courts to hear habeas petitions that had been dismissed in state court. Further, the presumption applied regardless of whether the state-law ground for dismissal was based on substantive law or procedural rules.[99]

When, as often occurs, a particular appeal raises both federal- and state-law issues, state courts sometimes fail to explain the actual basis upon which they rest their final decisions. State courts may discuss claims by referring to general legal principles without saying whether they are interpreting federal law or state law. The *Harris* and *Long* presumption has had the desirable effect of preventing *ad hoc* determinations by

---

92. *Id.* at 2568.

93. 111 S. Ct. 1454, 1470 (1991).

94. 489 U.S. 255 (1989). Justice O'Connor, who wrote the majority opinion in *Coleman* and concurred in the majority opinion in *Zant*, asserted in a concurring opinion in *Harris* that "miscarriage of justice" is "a kind of 'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence is precluded by an inability to show cause." 489 U.S. at 271.

95. The "deliberate bypass" standard was replaced for most factual settings by the "cause and prejudice" test. *See supra* notes 47-54 and accompanying text.

96. 463 U.S. 1032 (1983).

97. 489 U.S. 255 (1989).

98. *Id.* at 263.

99. *Id.* at 261.

federal courts as to whether they ought to hear claims on habeas review that had been invalid in state courts.

The Court, in *Harris*, after lengthy analysis weighing the value and cost of imposing its *per se* rule, declared that a conclusive presumption was appropriate: "[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."[100] The decision came in an 8-1 vote, rare near-unanimity for recent Court decisions on habeas practice. Only Justice Kennedy dissented; but, the argument of his dissent, which called for the imposition of exactly the opposite of the majority's "plain statement" rule, won a majority in *Coleman*.

In *Coleman*, the court did not claim to overrule *Harris*, but rather to explain it, by insisting that defendant Coleman read *Harris* "too broadly" and took it out of context.[101] In a stinging dissent, however, Justice Harry Blackmun declared that it was the majority that had misread *Harris*:

> I submit . . . that it is the majority that has wrested *Harris* out of the context of a preference for the vindication of fundamental constitutional rights and that has set it down in a vacuum of rhetoric about federalism. In its attempt to justify a blind abdication of responsibility by the federal courts, the majority's opinion marks the nadir of the Court's recent habeas jurisprudence, where the discourse of rights is routinely replaced with the functional dialect of interests. The Court's habeas jurisprudence now routinely, and without evident reflection, subordinates fundamental constitutional rights to mere utilitarian interests.[102]

The *Coleman* majority ruled that before the *Harris* presumption can be asserted, a habeas petitioner must show that the state court opinion dismissing the appeal "fairly appear[ed] to rest primarily on, or to be interwoven with, federal law."[103]

The *Coleman* majority side-stepped the fact that both the *Long* and *Harris* decisions dealt fully with the possibility that some decisions would be more ambiguous than others, and yet still imposed a *per se* conclusive presumption favoring federal review on the merits when any ambiguity exists. In *Harris*, the Court adopted the "plain statement" rule for habeas proceedings because, after weighing the impact of such a *per se*

---

100. *Id.* at 263 (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985) (quoting Michigan v. Long, 463 U.S. 1032, 1041 (1983))).

101. *Coleman*, 111 S. Ct. at 2557.

102. *Id.* at 2572-73 (Blackmun, J., dissenting).

103. *Id.* at 2550.

rule on both state and federal courts, it decided that the rule "achieves the important objective of permitting the federal court rapidly to identify whether federal issues are properly presented before it."[104] Before adopting the presumption favoring habeas, however, the Court considered an opposite rule, which would have required federal courts, when faced with ambiguous state appellate rulings that mingle federal law and state procedure, to presume that *state* law had been the basis of a ruling, which would effectively block most federal appeals. Those favoring this alternative presumption argued that applying the "plain statement" rule of *Long* would create needless delays and improperly usurp state authority.[105]

The *Harris* Court decided, however, that the "plain statement" rule favoring federal review "burdens those interests only minimally, if at all. The benefits, in contrast, are substantial."[106] The Court also pointed out that a state court desiring to avoid federal habeas review of its decision needed only to make it clear that it was relying on a state procedural bar, which would "foreclose federal habeas review to the extent permitted by *Sykes*."[107]

> Requiring a state court to be explicit in its reliance on a procedural default does not interfere unduly with state judicial decision-making. As *Long* itself recognized, it would be more intrusive for a federal court to second-guess a state court's determination of state law. . . . Moreover, state courts have become familiar with the "plain statement" requirement. . . .[108]

The *Harris* Court concluded that imposing a presumption opposite to the "plain statement" rule of *Long* would impose substantial burdens on the federal courts:

> [T]he federal habeas court would be forced to examine the state-court [sic] record to determine whether procedural default was argued to the state court, or would be required to undertake an extensive analysis of state law to determine whether a procedural bar was potentially applicable to the particular case. . . . Much time would be lost in reviewing legal and factual issues that the state court, familiar with state law and the record before it, is better suited to address expeditiously.[109]

---

104. Harris v. Reed, 489 U.S. 255, 265 (1989).
105. *Id.* at 271-79 (Kennedy, J., dissenting).
106. *Id.* at 264.
107. *Id.*
108. *Id.* (citation omitted).
109. Harris v. Reed, 489 U.S. 255, 264-65 (1989) (citation omitted).

As the lone dissenter in *Harris*, Justice Kennedy supported the imposition in habeas cases of the mirror image of the plain statement rule, i.e., that a state procedural ground should be presumed as the basis for an ambiguous ruling, *unless* the court clearly stated that it relied on federal law.[110]

In *Coleman*, the majority declared that federal review of a state ruling will be permitted only when the state ruling "fairly appear[s] to rest primarily on, or to be interwoven with, federal law."[111] The originally stated *Long* presumption sought to avoid involving the federal court in determining the effect of state law by permitting the federal court to cut through state procedural matters and go to the merits of the federal claim.

By insisting on the predicate that the state ruling "fairly appear" to involve federal law, the *Coleman* Court has forced federal habeas courts to do what the Court in *Harris* told them not to do: examine the entire record of the state appeal to make determinations of state procedural law.[112] Because the *Coleman* opinion offers no guidelines for determining what constitutes "fairly appearing" to involve federal law, federal judges are back to the pre-*Long* days, and must make *ad hoc* determinations that inevitably will lead to inconsistent standards applied from district to district. Given the Supreme Court's hostility to habeas review generally, it is not unreasonable to conclude that the Supreme Court, and thus lower federal courts, will take a very restrictive view of "fairly appearing."

It is especially ironic that the majority opinion placed so much importance on finality and saving judicial resources, but was not troubled by the delaying impact that its rule in *Coleman* will cause. Federal courts will have to sift through state law before reaching the merits of a claim. The *Coleman* majority minimized that concern, stating: "Any efficiency gained by applying a conclusive presumption, and thereby avoiding inquiry into state law, is simply not worth the cost in the loss of respect for the State that such a rule would entail."[113] The Court did focus at length, however, on the added cost to the state that would allegedly accrue if federal courts examined the merits of a case on habeas review.

The majority also declared that it was modifying the plain statement rule because it had "no power to tell state courts how they must write their opinions"[114] and, thus, would not impose on state courts "the responsibility for using particular language in every case in which a state

---

110. *Id.* at 286.
111. Coleman v. Thompson, 111 S. Ct. 2546, 2550 (1991).
112. Freedman, *supra* note 4, at C7.
113. *Id.* at 2558.
114. *Id.* at 2559.

prisoner presents a federal claim."[115] The Court did not explain why such a requirement would be such a burden, nor why that alleged burden was more important than cutting through procedure and getting to the merits of a claim.

In a method similar to the one it used in *McCleskey v. Zant*,[116] the *Coleman* Court dealt its judgment from a stacked deck—first announcing a new, higher threshold test for the petitioner to reach when presenting a claim in federal court, then determining that the defendant was unable to reach it.[117]

In *Coleman*, the Court first turned the "plain statement" rule on its head, then determined that defendant Coleman could not meet the requirements of its new rule, because the Virginia Supreme Court's decision was clear in basing its decision on state procedural law, and did not "fairly appear" to intermingle federal law.[118] That declaration, however, was simply and completely wrong.

Coleman's attorney missed, by three days, the deadline for filing a notice of intent to appeal the Virginia trial court's judgment against Coleman.[119] The state moved for dismissal of the entire appeal, but the Virginia Supreme Court declined to rule immediately. Both sides in the case then filed briefs on the merits, and the Virginia Supreme Court issued its ruling six months later with a terse announcement that it was dismissing the case "upon consideration" of all papers filed.[120]

Because Coleman's briefs included several federal constitutional claims, in his federal habeas petition, Coleman claimed that the state supreme court had intermingled its procedural law with federal law and, thus, he should be permitted to pursue his federal claim under the rule of *Harris*.[121]

The judgment by the Court that Virginia had not intermingled state law is mystifying in light of the majority's observation: "There is no doubt that the Virginia Supreme Court's 'consideration' of all filed papers adds some ambiguity. . . ."[122] Despite that, the Supreme Court insisted that the state court had been "explicit" in basing its dismissal "solely on procedural grounds."[123] The Supreme Court did not attempt

---

115. *Id.*

116. 111 S. Ct. 1454 (1991).

117. The court in *McCleskey* established the "cause and prejudice" test for abuse of writ, then determined that McCleskey could not meet the "cause" prong without addressing the "prejudice" prong, which McCleskey surely would have satisfied.

118. Coleman v. Thompson, 111 S. Ct. 2546, 2559 (1991).

119. *Id.* at 2552-53.

120. *Id.*

121. *Id.*

122. *Id.* at 2561.

123. *Id.*

to explain how the Virginia decision could be both ambiguous and explicit at the same time.

Coleman also argued, in vain, that his case was similar to *Ake v. Oklahoma*,[124] in which the United States Supreme Court held that when a state excuses its own procedural defaults in cases arguing "fundamental trial error" on appeal, federal law was necessarily implicated; thus, federal habeas review is available in such cases. Coleman argued that because the Virginia Supreme Court examined the underlying merits of his claim before issuing its ruling, it was subject to the rule of federal review as set forth in *Ake*.[125] To buttress the argument, Coleman cited a Virginia case, *Tharp v. Commonwealth*,[126] that indicated the state of Virginia would forgive procedural defaults when failing to do so would "abridge a constitutional right."[127] Coleman had raised a constitutional claim.

The United States Supreme Court brushed aside the *Ake* comparison, asserting only that *Ake* was a direct-review case and, accordingly, not applicable to habeas situations.[128] The Court then distinguished *Tharp* by noting that *Tharp* concerned the filing of actual appeal *petitions*, whereas Coleman's default had been in failure to file *notice* of an appeal.[129] Whatever technical justification there may have been for ignoring *Ake* and *Tharp*, the Court seemed more intent on splitting hairs than discussing the underlying claims. Justice Blackmun made that point forcefully in his dissent: "[T]he Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims . . . creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . . ."[130]

Attorneys for Coleman also sought to remedy their procedural default by arguing "cause and prejudice" under the *Sykes* test.[131] Defendant Coleman had a strong case that he would suffer "prejudice" if not permitted federal review. Indeed, Coleman faced execution because his attorneys filed his notice of appeal three days late. As in the *McCleskey* decision, however, the Court avoided determining whether the petitioner would be able to show prejudice, by determining that Coleman was unable to show "cause."

---

124. 470 U.S. 68 (1985).
125. Coleman v. Thompson, 111 S. Ct. 2546, 2560 (1991).
126. 175 S.E.2d 277 (Va. 1970).
127. *Id.* at 278.
128. Coleman v. Thompson, 111 S. Ct. 2546, 2560 (1991).
129. *Id.* at 2560-61.
130. *Id.* at 2569 (Blackmon, J., dissenting).
131. *See supra* notes 51-57 and accompanying text.

The Court determined that attorney error is insufficient to show "cause." Citing *Murray v. Carrier*,[132] the Court reaffirmed that ignorant or inadvertent attorney error is an insufficient cause,[133] unless the attorney error rises to the level of Sixth Amendment ineffective assistance of counsel, as detailed in *Strickland v. Washington*.[134]

The *Coleman* majority concluded that attorney "ignorance or inadvertence" is not cause "because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must 'bear the risk of attorney error.'"[135] Coleman had argued that his attorney's ineffective assistance at trial and appeal was so severe that his lawyer ceased to be his agent.[136] However, the Court declared that to accept this argument would "be contrary to well-settled principles of agency law."[137]

This agency law analysis underscores the callousness of the Court, which saw no difference between matters of civil litigation based in agency law and a capital murder case. Equating the two leads to potentially absurd results. If agency law, indeed, is of central concern in capital cases, then what is the defendant's remedy against his attorney after he has been executed by the state? Because only the state can commute a death sentence, a defendant could not seek an injunction to stop his execution based on a claim that his attorney was merely "ignorant and inadvertent." Of what use would a traditional money judgment be to a capital defendant? Would his family inherit his right to sue? Finally, if such a money judgment was sought, what percentage of responsibility would a merely "ignorant" attorney bear in helping to send his client to the gas chamber?

The Court also reaffirmed in *Coleman* the rule in *Murray* that, because a petitioner has no constitutional right to counsel in state post-conviction proceedings, a petitioner may not claim ineffective assistance of counsel in such proceedings.[138] The Court rejected Coleman's con-

---

132. 477 U.S. 478 (1986).

133. *Coleman*, 111 S. Ct. at 2566-67.

134. *Id.* at 2566 (citing Strickland v. Washington, 466 U.S. 668 (1984)). *Strickland* set a "cause and prejudice" test and determined that a defendant seeking to show ineffectiveness of counsel severe enough to reach constitutional magnitude must demonstrate that his attorney's performance was deficient and that it prejudiced the defense. The "benchmark" of the standard is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). The *Strickland* standard is considered generally a very difficult standard to meet. *See generally* GEOFFREY C. HAZARD, JR. & SUSAN P. KONIAK, THE LAW AND ETHICS OF LAWYERING 156-80 (1990).

135. *Coleman*, 111 S. Ct. at 2566-67 (citations omitted).

136. *Id.* at 2567.

137. *Id.* (citations omitted).

138. *Id.* at 2566.

tention that when no constitutional right to counsel exists, it should be enough that the defendant is able to show ineffective assistance of counsel that would meet the *Strickland* standard.

Finally, the *Coleman* majority ignored that the state appeals court had made fundamental judgments of federal law that were held binding on Coleman without review by a federal court. Inexplicably, the Court argued both that the Virginia Supreme Court did not "fairly appear" to base its decision on federal law, and that Coleman had a fair hearing of his federal claims. The Court did not try to explain that inconsistency, nor does it appear it could have.

Roger Keith Coleman was executed in the Virginia electric chair on May 20, 1992.[139] In the final weeks of his life, his case became a *cause celebre* that focused national attention on capital punishment and the appeals process.[140] Coleman was interviewed by scores of journalists, and Time Magazine put his picture on the cover of its May 18, 1992 edition.[141] Just two days before his execution, in a particularly macabre episode, Coleman was interviewed from his jail cell on the television show "Donahue" as his weeping mother sat watching from the show's studio.[142]

IV. Assistance of Counsel in Capital Cases

Neither side in the habeas debate in Congress disputes the need to eliminate frivolous habeas claims and bring criminal proceedings to finality.[143] The ABA proposal lays the blame for lengthy habeas at the doorstep of the states for failing to provide adequate counsel in the initial stages of capital cases.[144] In fact, the ABA Habeas Task Force claims:

> [A] single defect in the current system of processing capital cases in this country is principally responsible for the disproportionate

---

139. Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. Times, May 21, 1992, at A20.

140. *Id.*

141. *This Man Might Be Innocent; This Man is Due to Die*, Time, May 18, 1992.

142. Applebome, *supra* note 139.

143. Though habeas corpus practice involves both capital and non-capital litigation, both sides in the habeas debate focus on capital litigation as the primary source of concern since capital cases are the most involved and subject to more levels of review than non-capital cases.

144. *Fairness and Efficiency in Habeas Corpus Adjudication: Hearings Before the Subcomm. on Civil and Constitutional Rights*, 101st Cong., 2d Sess. (1991) (summary of testimony of John J. Curtin, Jr., President of the American Bar Association, and James S. Liebman, Professor of Law, Columbia University School of Law, and member, ABA Task Force on Death Penalty Habeas Corpus, on Behalf of the ABA) [hereinafter Liebman statement].

> and wasteful amount of time and resources devoted to reviewing capital convictions and sentences in federal habeas corpus proceedings. That defect is the absence, insufficient compensation, and/or inexperience of counsel in the state capital proceedings that precede federal habeas proceedings.[145]

The most recent habeas reform legislation passed by the House of Representatives, House Bill 3371,[146] adopts the ABA and Judicial Conference proposals, and would require states to set up a system of neutrally certified and adequately compensated attorneys at all stages of capital litigation.

The most recent bill approved by the Senate, Senate Bill 1241,[147] would not require states to provide counsel in capital cases, but would offer incentives for them to do so in the form of tougher standards for permitting federal habeas review of capital cases. These tougher standards would be available only to those states that choose to provide attorneys to indigents. The Senate bill would require states to provide such representation only during postconviction proceedings and would permit states to set up any system for appointing and monitoring the attorneys they choose, as long as all indigent clients under capital sentence have access to counsel.

V. The "Full and Fair" Standard

The most controversial aspect of the Bush Administration habeas proposal is a provision that would prohibit entirely federal habeas review of any claim that has been "fully and fairly adjudicated in State proceedings."[148] Opponents of the "full and fair" standard claim it would

---

145. *Id.* Additionally, the ABA claims that the absence and inadequacy of state counsel is the principal cause for a 40% rate of constitutional error found in capital cases. *Id.*

146. H.R. 3371, 102d Cong., 1st Sess. § 1105 (1991).

147. S. 1241, 102d Cong., 1st Sess. § 2256 (1991).

148. S. 1241, 102d Cong., 1st Sess. § 2254(d) (1991). The current habeas statute, 28 U.S.C. § 2254, provides only that state court determinations are presumed to be correct "unless it shall otherwise appear . . . that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or that the applicant was otherwise denied due process of the law in the State court proceeding." *Id.* Applicants under the current statute may rebut the presumption that state findings are correct by offering "convincing" evidence. 28 U.S.C. § 2254(d). Senate Bill 1241, in addition to prohibiting a federal court from hearing any claim that received a "full and fair" hearing, sought to raise the requirement for rebutting the presumption to "clear and convincing" evidence. S. 1241, 102d Cong., 1st Sess. § 2254(d),(e).

Another major issue in habeas reform involves the retroactive application of "new rules" of law to persons awaiting habeas corpus review. Under Teague v. Lane, 489 U.S.

strip the federal courts of their habeas corpus review power; proponents claim that it would require reasonable deference to state decisions.

Opponents of the "full and fair" standard include about 400 law professors, from around the country, who signed a letter from Professor Larry W. Yackle of Boston University School of Law to the House Judiciary Committee "warning the Committee that adoption of this standard 'will largely abolish the Federal courts' current and long standing [sic] authority to enforce the Bill of Rights in [the habeas corpus] context.'"[149] The House Judiciary Committee of the 102d Congress agreed with the opponents, and rejected an amendment that would have added the "full and fair" standard to House Bill 3371.[150]

The Bush Administration claimed that the "full and fair" standard would "apply a uniform criteria of reasonableness to review both factual and non-factual determinations . . . [and would] further the legitimate interest of finality."[151] The Bush Administration said that the "full and fair" standard would apply only if the claim presented was decided on the merits in state proceedings, the state determination was a reasonable interpretation of federal law and the facts, and adjudication was conducted in a manner consistent with the procedural requirements of federal law.[152]

The House Judiciary Committee concluded that the definition and likely construction by the courts of "full and fair" was too uncertain. The Committee decided not to attempt to write a definition of the standard because, it said, the Supreme Court likely would consider only the statute's exact language and not the published legislative intent when trying to interpret the "full and fair" standard.[153] The Committee concluded that the Supreme Court "might well" define "full and fair" in such a way as to eliminate habeas corpus as a postconviction remedy.[154]

The Bush Administration claims that federal courts, and not state courts, will determine whether a state claim was "fully and fairly" adjudicated.[155] This, however, is not very reassuring. The Supreme Court

---

288 (1989), a "new rule" that would be favorable to a prisoner may not be applied retroactively during habeas corpus proceedings, but may be applied only while the prisoner's case is pending on direct appeal. Opponents of *Teague* claim that it, like the "full and fair" standard, threatens to eliminate completely federal habeas corpus. The ABA proposal calls for Congress to overrule *Teague*. The Bush Administration proposal supports *Teague*. A full discussion of retroactivity is beyond the scope of this Note.

149. H.R. Rep. No. 242, 102d Cong., 1st Sess., pt. 1, at 123 (1991).

150. *Id.* at 119.

151. Open Letter, *supra* note 78.

152. *Id.*

153. H.R. Rep. No. 242, 102d Cong., 1st Sess., pt. 1, at 124.

154. *Id.*

155. Open Letter, *supra* note 78.

has worked diligently to curtail federal habeas corpus. Therefore, the lower federal courts will be prevented from looking too deeply at state decisions. The result of any law that prohibits federal review of a "fully and fairly" adjudicated state claim will be the death of federal habeas corpus.

VI. Conclusion

In recent years, the United States Supreme Court has implemented most of the restrictions on federal habeas corpus review that the Bush Administration bill would impose. All that remains is for habeas corpus to be eliminated completely, an effect which would be accomplished by imposing the "full and fair" standard. Those in Congress who favor a more open habeas policy are likely to find little support because of the hostility that President Bush and the Supreme Court have exhibited toward habeas.

However, Congress ought to demand, at least, that concerns for procedural rules and legal technicalities do not prevent justice from being served. Congress should adopt a habeas law that would ensure state prisoners are not locked out of federal court because of unintended or "ignorant" errors of their attorneys. In addition, successive habeas petitions ought to be permitted when new facts show that a prisoner was either wrongly convicted, or that a sentence was too harsh.

Habeas corpus exists, and has for 202 years, to make certain that criminal sanctions are applied uniformly. This requires a watchful federal court system that is prepared to examine a suspect decision. The Supreme Court, by making it clear that it will permit federal review in only very few cases, is encouraging state courts to act capriciously. The message to prosecutors from *McCleskey* and *Coleman* is clear: Violate individual rights if you wish, but cover your tracks.

Being tough on crime does not require locking the federal courthouse door. The elimination of habeas corpus will not demonstrate to the nation that Congress or the Supreme Court are on the side of law and order; it will demonstrate that those institutions value political expedience over justice.

Dumping Drug Dealers Off the Dole: An Examination of the Procedural Due Process Implications of Pre-Hearing Seizures of Public Housing Leaseholds from Tenants Involved in Drug Trafficking

Amy L. Ficklin*

"[I]n America these days, there is nothing so sensible, necessary, or appropriate that a judge can't be found to block it." — Boston Herald[1]

Introduction

In Chicago, a woman hands over a dollar to gun-wielding punks so she can enter the lobby of her building, get her mail, and ride the elevator up to her own apartment. Still more money is extorted by the drug dealers who call her hallway their "turf." Drug dealers congregate outside a Philadelphia Head Start center full of children. Parents do not let their children play outside in the daytime, and at night the family sleeps on mattresses laid on the floor because they are afraid of stray bullets from gun fights.[2] These scenarios occur every day across the country for many of the 1.3 million residents of public housing.[3] The high concentration of poverty has made public housing developments especially vulnerable to drugs and drug trafficking and has turned low-income housing into what the Office of National Drug Control Strategy has identified as a "staging area for the distribution of drugs and the violence related to drug trafficking and consumption."[4]

In enacting the Anti-Drug Abuse Act of 1988 (The Act),[5] Congress recognized that public housing, which should be safe, decent, and free of illegal drugs, is instead plagued with rampant drug-related crime. Problems with inefficient eviction procedures led Congress to create a

---

* J.D. Candidate, 1993, Indiana University School of Law—Indianapolis; A.B., 1987, Indiana University.

1. *Get Off Our Property*, Boston Herald, June 26, 1990, at 6.

2. *See, e.g.*, Jack Kemp, Address to the President's Drug Advisory Council (Nov. 9, 1990); *see generally Balancing Rights: Is There Any Room for Leniency in Evicting Drug Dealers from Public Housing?*, Phila. Inquirer, June 16, 1990, at 8A.

3. Telephone interview with Anthony Mitchell, Deputy Assistant Secretary for Public Affairs, Department of Housing and Urban Development (Jan. 3, 1992).

4. Office of National Drug Control Strategy, National Drug Control Strategy 64 (Feb. 1991).

5. Pub. L. No. 100-690, § 5105, 102 Stat. 4181 (1988).

new mechanism to efficiently and effectively remove tenants who use their housing units to deal drugs (or allow their guests to do so) and return the developments to law-abiding tenants.[6] The Act, subtitled "Preventing Drug Abuse in Public Housing," amended the civil forfeiture statute[7] to provide for the forfeiture of a leasehold interest which is

---

6. *See How the LSC Helps Drug Dealers*, WASH. TIMES, June 16, 1990, at D2 (removal of convicted drug dealer in Lowell, Massachusetts delayed 13 months; drug dealer in Macon, Georgia whose eviction was delayed for one year, but when jury finally heard case it decided to evict in only four minutes); James P. Moran, Jr., *High Noon in Alexandria: How We Ran the Crack Dealers Out of Public Housing*, HERITAGE FOUND. REP., March 20, 1990, at 73 (describes administrative grievance procedure for evictions of known drug dealers as taking up to two years, but it is easier to evict a tenant for non-payment of rent).

The HUD regulations implementing this provision are found at 24 C.F.R. §§ 882.118, 882.210 and 882.413 (1991). HUD has also required public housing agencies to revise the standard lease to provide that drug-related activity is a sufficient basis for eviction. 24 C.F.R. § 966 (1991).

7. 21 U.S.C. §881 (1991) provides in pertinent part:

(a) Property subject

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * *

(7) All real property including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure.

Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except the seizure without such process may be made when:

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgement in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture

used, or intended to be used in any manner, to commit or facilitate a felony drug violation. Senator Joseph Biden, Judiciary Committee Chairman and one of the Act's sponsors, stated:

> Chapter 1 of this subtitle codifies current HUD guidelines granting public housing agencies authority to evict tenants if they, their families or their guests engage in drug-related activity. It also allows the federal government to seize housing units from tenants who violate drug laws by clarifying that public housing leases are considered property with respect to civil forfeiture laws.[8]

Although civil forfeitures are *in rem* actions against "guilty" property, or property which has been used to facilitate drug trafficking, the Supreme Court considers forfeitures "quasi-criminal" in nature because they serve many of the same goals as the criminal justice system.[9] Consequently, the Constitutional rights and safeguards in the Fourth and Fifth Amendments also apply to civil forfeiture.[10] In fact, the civil forfeiture statute allows seizure in the same manner under which search warrants are obtained — evidence that Congress also views civil forfeitures as "quasi-criminal."[11]

---

under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Federal Rule of Criminal Procedure 41 requires an *ex parte* finding of probable cause by a judicial officer to support issuance of the warrant.

8. 134 CONG. REC. S 17360 (daily ed. Nov. 10, 1988). In § 5101 of the Act, Congress also amended the public housing statute (United States Housing Act of 1937) to require that all public housing leases prohibit drug-related criminal activity and that such activity is grounds for eviction.

9. United States v. $8,850 in U.S. Currency, 461 U.S. 555, 564 (1983) (applying the balancing test involving a criminal's right to a speedy trial to the issue of whether or not a delay in civil forfeiture proceedings is unreasonable); *see generally* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

Thus, just as an arrest warrant is issued for the seizure of an allegedly guilty person or a search warrant for the seizure of evidence, a seizure warrant is issued to seize allegedly guilty property. *See* United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991) (although there are some factual inaccuracies in footnote 64 regarding *Richmond Tenants Org., Inc. v. Kemp*).

10. Boyd v. United States, 116 U.S. 616, 634-35 (1886); *see also Calero-Toledo*, 416 U.S. at 680-90 (detailing the history and upholding the validity of forfeitures); Cheh, *supra* note 9 (history, background and theory behind civil forfeiture).

Additionally, because of the evidence gathered prior to seizure, most forfeiture actions are accompanied by criminal prosecutions, although this is not required under the statute.

11. *See supra* note 7.

Additionally, the procedure followed in a civil forfeiture is very similar to that of a criminal case. Law enforcement authorities identify a problem area, conduct an investigation, and present the evidence to the U.S. Attorney, who then must decide whether to file a forfeiture complaint. Although the forfeiture statute authorizes adoption of a procedure that does not require a warrant based upon a showing of probable cause, Department of Justice policy requires a U.S. Attorney to obtain *ex parte* judicial approval prior to any seizure of real property.[12] If a complaint is filed and the court determines there is probable cause to believe the property is used for drug trafficking, then a seizure warrant will be issued. When the property is a residence, the U.S. Attorney has the discretion to enter into an occupancy agreement with the residents, allowing them to stay on the property until the conclusion of the forfeiture proceeding.[13] After discovery and motions, a trial is held to determine whether the forfeiture should be ordered and the title to the property

---

12. Cary H. Copeland, *Departmental Policy Regarding Seizure of Occupied Real Property* (Oct. 9, 1990) (Memorandum from the Director, Executive Office of Asset Forfeiture, to United States Attorneys) (on file with the author and each U.S. Attorney's office) (restatement of policy stated in Jan. 11, 1990 memorandum). The same procedure is specified in the Federal Rules of Criminal Procedure for search warrants. FED. R. CRIM. P. 41.

13. Department of Justice policy favors permitting residents to remain on the property:

> 1. *Permitting Continued Occupancy*
>
> As a general rule, occupants of real property seized for forfeiture should be permitted to remain in the property pursuant to an occupancy agreement pending forfeiture provided that:
>
> a. The occupants agree to maintain the property [and continue to make rent payments]; . . .
> b. The occupants agree not to engage in continued illegal activity;
> c. The continued occupancy does not pose a danger to the health or safety of the public or a danger to law enforcement;
> d. The continued occupancy does not adversely affect the ability of the U.S. Marshal or his designee to manage the property; and,
> e. The occupants agree to allow the U.S. Marshal or his designee to make reasonable periodic inspections of the property with adequate and reasonable notice to the occupants.
>
> 2. *Removal of Occupants Upon Seizure*
>
> Immediate removal of all occupants at the time of seizure should be sought if there is reason to believe that failure to remove the occupants will result in one or more of the following:
>
> a. Danger to law enforcement officials or the public health or safety;
> b. The continuation of illegal activity on the premises; or
> c. Interference with the Government's ability to manage and conserve the property.

Copeland, *supra* note 12.

turned over to the government.[14] If a judge or jury is convinced that the United States has proven its case and that the residents have failed to disprove the government's case or successfully assert an innocent owner defense,[15] the court will enter an order of forfeiture.[16]

In response to the severe drug problem in public housing and the new mechanism created by Congress, the Department of Housing and Urban Development (HUD) and the Department of Justice (DOJ) developed the Public Housing Asset Forfeiture Demonstration Project (Forfeiture Project) to encourage U.S. Attorneys and local public housing authority officials to collaborate in an effort to remove drug dealers from federally subsidized housing. HUD and DOJ chose more than twenty cities of varying sizes and diverse geographic locations to participate.[17] The selections were based on the severity of the public housing authority's drug problem, the inefficiency of the eviction process, and the amount of cooperation and goodwill public housing officials enjoyed with their tenants.[18] HUD and DOJ then drafted a Notice to Residents which explained that under the civil forfeiture law a public housing unit may be seized if the tenants use, or allow others to use, the unit for drug trafficking.[19] This Notice was distributed to all public housing tenants in the targeted cities early in June of 1990.

---

14. This process can be expedited upon request. *See infra* notes 108-12 and accompanying text.

15. The innocent owner defense is included in 21 U.S.C. § 881. However, the United States Supreme Court has previously rejected the innocent owner defense stating "the innocence of the owner of the property subject to forfeiture has almost uniformly been rejected as a defense." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683-84 (1974).

16. *See generally* 21 U.S.C. § 881 et. seq. (1991); *Calero-Toledo*, 416 U.S. at 680-90 (history of forfeitures); DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES (Matthew Bender 1991) (forfeiture procedure information); OLIVER W. HOLMES, JR., THE COMMON LAW (1881) (history of forfeitures); Cheh, *supra* note 9 (procedure information and history of forfeitures); Christopher M. Neronha, *In re Metmor Financial, Inc.: The Better Approach to Post Seizure Interest Under the Comprehensive Drug Abuse Prevention and Control Act*, 65 NOTRE DAME L. REV. 853 (1990) (explaining that the Fourth Circuit was the first appellate court to consider and grant the award of post-seizure interest to an "innocent owner").

17. The cities chosen to participate in the Project included: New York City, Los Angeles, Washington D.C., Chicago, St. Louis, Atlanta, Dallas, Baltimore, Indianapolis, Hartford, Newark, Frederick, Richmond, Flint, Charleston, Macon, El Paso, Kansas City, Omaha, Chandler, Tacoma, and Portland.

18. The Project was first announced by HUD Secretary Jack Kemp in May of 1990.

19. The Notice to Residents read, in part:

> Under federal law, a unit can be taken by the United States Government if any member of the household is using the unit for selling drugs. This may result in the *immediate* eviction of the entire household unless the resident can

Based on successful public housing forfeiture programs in New York City, Chicago, and Bridgeport, Connecticut, HUD and DOJ developed suggested case criteria which go beyond statutory requirements for use by U.S. Attorneys and public housing officials in selecting cases for the project.[20] The Forfeiture Project targeted cases where compelling evidence was obtained pursuant to a search warrant or undercover investigation to indicate that the unit involved was a notorious site of drug trafficking and the leaseholder had participated in, or knowingly allowed, at least two felony drug offenses. This strict requirement ensured that the targeted tenant would also likely face criminal charges. Additionally, U.S. Attorneys were directed to give careful consideration to innocent family members, including pre-arranging temporary housing and other social services for any children or elderly residents who might be adversely affected by a forfeiture.[21] However, actual case selection was ultimately left to the discretion of the U.S. Attorney and public housing authority

---

prove that he or she did not know about the criminal conduct.

Each resident *must make sure* that his or her unit is not being used for drug-related activities by members of the household or by guests. To protect yourself, make sure that you are aware of what is happening in your unit. If you find that drug dealing is taking place, you should see to it that the person(s) involved leave your household. If you need help doing this, you may call the police, housing authority, or development manager to assist you. Otherwise, you may face the seizure of your unit by the United States Government and immediate eviction.

In an Order dated June 18, 1990, the district court enjoined enforcement of the first paragraph.

20. The complete HUD/DOJ criteria for case selection are:

1. The violator should be the leaseholder of the property. (The term "violator" refers to the person whose actions give rise to the forfeiture.)
2. Compelling evidence should be developed that the violator participated in at least two felony drug offenses. (Drug purchases by undercover law enforcement officials from individual notorious drug dealers or evidence obtained pursuant to a search warrant would satisfy this criteria.)
3. Where appropriate, the violator should also be prosecuted by local, state or federal authorities for drug activities.
4. The property should be an open and notorious site of drug distribution.
5. Careful consideration should be given to factors involving family members of the violator and other registered occupants of the property. Those involved in this effort will seek to minimize the impact of the Government's actions on minors and/or the elderly, should they be effected by the action. Appropriate human resource services support (i.e. child welfare, emergency shelter, etc.) should be prearranged where minors or the elderly are affected.

United States v. Leasehold Interest in 121 Nostrand Ave., 760 F. Supp. 1015, 1026 (E.D.N.Y. 1991). The weight given to each criteria is determined by the U.S. Attorney on a case by case basis.

21. News release from Department of Housing and Urban Development, *HUD and Justice Strike Against Drug Dealers in Public Housing*, June 25, 1990, at 1-2.

in each participating city. "There was only one binding requirement: the United States Attorneys were directed that in all cases (regardless of whether immediate dispossession is sought), 'Department of Justice officials shall obtain *ex parte* judicial approval prior to seizure of realty.' "[22] No guidance, other than the previously stated DOJ policy, was given concerning the circumstances in which a U.S. Attorney could remove tenants prior to notice and hearing in accordance with the forfeiture statute.[23]

Before the Forfeiture Project could be implemented, the Richmond Tenants Organization and others brought suit against the Secretary of Housing and Urban Development, the U.S. Attorney General, the Department of Justice and the Richmond Redevelopment and Housing Authority in *Richmond Tenants Organization, Inc. v. Kemp*.[24] The amended complaint sought a declaration that no-notice seizures in general and, more specifically the planned Forfeiture Project, are unlawful and requested an injunction barring any such seizures and any steps to implement the Forfeiture Project.

Three days later, on June 18, 1990, the District Court for the Eastern District of Virginia preliminarily enjoined the government from evicting household members of public housing units whose leaseholds had been seized without prior notice and an opportunity to be heard. However, the government was permitted to continue executing warrants of arrest *in rem*, seizure warrants and writs of entry.[25] The court specified that its order did not affect DOJ's authority to seek the immediate eviction of household members in exigent circumstances.[26] Eventually, the court (Williams, J.) granted the plaintiffs' motion for summary judgement, holding that no-notice removal of tenants from public housing without a pre-seizure hearing violates due process, except in extraordinary situations.[27]

DOJ appealed the district court decision and the Court of Appeals for the Fourth Circuit affirmed the trial court.[28] Seizures, both with and

---

22. Appellant's Brief at 5, *Richmond Tenant's Org. v. Kemp*, 753 F. Supp. 607 (E.D. Va. 1990) (on appeal to 4th Cir.) (No. 91-1520) [hereinafter Appellant's Brief].

23. The Oct. 9, 1990, DOJ policy memoranda (*see supra* notes 11-12) was the first time DOJ issued a written statement of the DOJ policy. The memoranda was issued because of this litigation, but the policy was not changed as a result of it.

24. 753 F. Supp. 607, 608 (E.D. Va. 1991), *aff'd*, 956 F.2d 1300 (4th Cir. 1992).

25. The court provisionally denied the plaintiffs' motion for class certification but on June 22, 1990 extended its June 18, 1990 order to the prospective class of nationwide public housing residents.

26. *Richmond Tenants Org.*, 753 F. Supp. at 608. However, the district court did not define an exigent circumstance.

27. *Id.* at 609. The court also denied plaintiff's renewed motion for class certification.

28. Richmond Tenants Org. v. Kemp, 956 F.2d 1300 (4th Cir. 1992).

without removal of tenants, were conducted in most of the participating cities during the week of June 25, 1990, but the Forfeiture Project was later halted until the outcome of this litigation.[29] *Richmond Tenants Organization* is one of the few district court decisions involving forfeiture in public housing[30] and the only court of appeals decision on the issue to date.

This Note examines the procedural due process issues attending the forfeiture of public housing units, focusing on *Richmond Tenants Organization*.[31] The Note argues that a facial challenge to the civil forfeiture statute and the Forfeiture Project ultimately fails, as does the inherent dispute with the legitimacy of prosecutorial discretion. Further, this Note argues that although procedural due process generally requires notice and an opportunity for a hearing prior to permanent deprivation of property, forfeitures of public housing meet the requirements for extraordinary situations enumerated by the Supreme Court in *Fuentes v. Shevin*[32] and *Calero-Toledo v. Pearson Yacht Leasing Co.*,[33] thus justifying postponement of notice and a hearing. This Note also maintains that the civil forfeiture statute and the Forfeiture Project meet the procedural due process standards established by the Supreme Court in *Mathews v. Eldridge*.[34] Finally, this Note concludes that the district court and court of appeals in *Richmond Tenants Organization* misapplied these

---

29. *See, e.g.*, Andrew Fegelman, *U.S. Law Helps CHA Fight Drugs*, CHI. TRIB., June 27, 1990, at 13C; Adam Geib, *Police Seize Tenants' Leases in Techwood Raid*, ATLANTA J.-CONST., June 30, 1990, at 1B; Randolph Goode and Peter Hardin, *Drug Eviction Notices are Filed in Richmond*, RICHMOND NEWS LEADER, June 26, 1990, at 1; Dan Maley, *Public Housing Drug Raids Result in Three Arrests*, MACON TELEGRAPH AND NEWS, June 26, 1990, at 1B.

30. *See also* United States v. The Leasehold Interest in 121 Nostrand Ave., Apt. 1-C, Brooklyn, N.Y., 760 F. Supp. 1015 (E.D.N.Y. 1991) (requiring pre-seizure notice and hearing); United States v. Leasehold Interest in Property Located at 850 S. Maple, Ann Arbor, Mich., 743 F. Supp. 505 (E.D. Mich. 1990) (requiring notice and hearing prior to seizure and eviction); United States v. Leasehold Interest in Property, 740 F. Supp. 540 (N.D. Ill. 1990) (criticizing such efforts as a waste of prosecutorial resources).

31. Although other minor issues are also included in *Richmond Tenants Org.*, this Note will be limited to due process concerns. For example, it is arguable that the plaintiffs lacked standing because they did not allege that their apartments were being used for drug dealing, that the circumstances were such that forfeiture proceedings were likely to be initiated against them and that immediate removal without prior notice or hearing would have been sought. The Supreme Court requires that plaintiffs must show a likelihood that they will violate the law and otherwise be in a situation making enforcement of the alleged illegal law enforcement practices or policies imminent, before obtaining an injunction. O'Shea v. Littleton, 414 U.S. 488 (1974); Los Angeles v. Lyons, 461 U.S. 95 (1983).

32. 407 U.S. 67 (1972).

33. 416 U.S. 663 (1974).

34. 424 U.S. 319 (1975).

precedents by ignoring Congressional intent, minimizing the important governmental interests to provide safe and drug-free public housing, and challenging the adequacy of a judicial probable cause finding.

I. Procedural Due Process and Public Housing Leasehold Forfeitures

A. The Facial Challenges to the Civil Forfeiture Statute and the DOJ Forfeiture Project Fail

Unlike the few other cases decided on this issue, the plaintiffs in *Richmond Tenants Organization* did not challenge the manner in which a particular forfeiture was conducted.[35] Rather, the plaintiffs filed suit before any actual seizures had occurred and argued that the Forfeiture Project was constitutionally invalid because it did not provide adequate due process protection.[36] However, because the Forfeiture Project merely gave a U.S. Attorney the discretion to follow the optional procedure set out by Congress in the forfeiture statute,[37] the plaintiffs made what amounted to a facial challenge against both the forfeiture statute and the Forfeiture Project. For such a challenge to be successful, the plaintiffs must establish that there is no set of circumstances under which the statute may validly be applied to immediately remove a tenant from a public housing unit without giving the tenant prior notice and a hearing.[38]

The district court recognized that no-notice removals are valid if there are "exigent circumstances" to justify the lack of notice and failure to hold a hearing prior to seizure.[39] In allowing this exception, the district court followed the decision of the Second Circuit Court of Appeals in *United States v. Premises and Real Property Located at 4492 Livonia Rd.*,[40] a case involving the forfeiture of private real property which held that due process bars pre-hearing seizures, even without eviction, absent "extraordinary" circumstances.[41] In keeping with this approach, no circuit

---

35. *See supra* cases cited in note 30.

36. *See generally* Appellee's Brief, *supra* note 22.

37. *See supra* note 7.

38. United States v. Salerno, 481 U.S. 739, 745 (1987).

39. The district court enjoined pre-hearing removals "except in exigent circumstances." 753 F. Supp. at 609.

40. 889 F.2d 1258 (2d Cir. 1989), *reh'g granted* 897 F.2d 659 (2d Cir. 1990).

41. *Id.* at 1265, 897 F.2d at 661; *see also In re* Application of Kingsley, 802 F.2d 571, 580, 583 (1st Cir. 1986) (in a concurring and a dissenting opinion, two circuit judges held that seizure of a home based on a judicial finding of probable cause violated the owner's due process rights because the seizure occurred prior to filing a civil forfeiture

has held that pre-hearing seizures are invalid in all cases. The Eleventh Circuit has adopted a more deferential view by holding that a hearing is not required prior to seizure of private residential property.[42] However, the Fourth Circuit chose not to follow the Eleventh Circuit in deciding *Richmond Tenants Organization*.[43] The result places the government in the untenable position of not being able to seize property by a procedure that is constitutionally adequate for other types of seizures, including an arrest.[44] As the Supreme Court has observed,

> [I]t would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that under appropriate circumstances, the Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense.[45]

This facial challenge necessarily includes the contention that the forfeiture statute is invalid because it allows the government the option to request a seizure warrant in the same manner as provided for a search warrant. This pinpoints the fallacy of the court's reasoning because the execution of a search warrant does not require prior notice. In the case of residential property, the government's decision includes a determination regarding the removal of the occupants. Both decisions are part of the prosecutorial discretion given to each U.S. Attorney concerning the

---

complaint).

The district court in *Richmond Tenants Org.* incorrectly cited *Livonia*, *Kingsley* and another case, United States v. Parcel I Beginning at Stake, 731 F. Supp. 1348 (S.D. Ill. 1990), as being part of the case law on forfeiture of public housing leaseholds. 753 F.2d at 609. All of these cases involve private property, which this Note contends makes a considerable difference when assessing the governmental and public interests at issue and the need for prompt action.

42. United States v. A Single Family Residence, 803 F.2d 625, 631-32 (11th Cir. 1986).

43. Instead, the court of appeals discounted the Eleventh Circuit's holding, by stating that it was unclear in that case whether the residents lived on the property at the time of the seizure and whether the seizure included an eviction. 956 F.2d 1300 (4th Cir. 1992).

44. United States v. Valdes, 876 F.2d 1554, 1559 (11th Cir. 1989) (seizure of property under civil forfeiture statute "is essentially the same as the arrest of a person.").

45. United States v. Monsanto, 491 U.S. 600, 615-16 (1989) (emphasis in original). In *Monsanto*, an adversary hearing had been held concerning an order to freeze assets. Nevertheless, it reveals a basic flaw in the ruling of the district court and court of appeals: property suspected of involvement in a crime has a right to notice and hearing while a person does not. This paradox is particularly bewildering because property in a forfeiture proceeding is viewed as analogous to an individual defendant charged with wrongdoing. *See* United States v. United States Coin and Currency, 401 U.S. 715, 719-20 (1971).

manner in which the case is conducted.[46] Beyond this, the validity of a facial challenge to the forfeiture statute has already been established by the Supreme Court's development of special procedural due process rules for cases involving "exigent circumstances."

B. Exigent Circumstances: Fuentes v. Shevin and Calero-Toledo v. Pearson Yacht Leasing Co.

Drug trafficking in public housing contaminates the living environment of law-abiding tenants. Dealing promptly and effectively with this problem serves an important public interest. The Supreme Court has held that government seizures of misbranded vitamins, diseased poultry, and taxes justify no-notice seizures.[47] The common theme among these

---

46. Though the question is ultimately left to each U.S. Attorney, DOJ has issued a memorandum regarding departmental policy on the seizure of any occupied property and immediate removal of occupants:

A. Reason to believe that leaving occupants in possession will result in danger to the health and safety of the public or to law enforcement may be based upon the following:
   1. The nature of the illegal activity;
   2. Presence of weapons, "booby traps," or barriers on the property;
   3. Information that occupants will intimidate or retaliate against cooperating individuals, neighbors, or law enforcement personnel;
   4. Presence of serious safety code violations; or
   5. Contamination by[,] or presence of[,] dangerous chemicals.

B. Reason to believe that leaving occupants in possession will result in continued use of the property for illegal activities may be based upon:
   1. The nature of the illegal activity (e.g., repetitive drug sales);
   2. The history of the property's and/or occupant's involvement in illegal activities;
   3. Evidence that all occupants have been involved in the illegal activity;
   4. The inability of non-participating occupants to prevent continued illegal activity; or
   5. The failure of other sanctions to stop illegal activity.

C. Reason to believe that leaving occupants in possession might undermine the U.S. Marshal's or his designee's ability to manage the property may be based upon all the factors set out above or information that the occupants intend to waste or destroy the property.

D. The above list of circumstances is not intended to be exclusive. Attorneys for the Government may find other circumstances justifying immediate removal of the occupants based upon demonstrable and articulable information provided by credible sources.

Copeland, *supra* note 12 (emphasis in original) (on file with the author and each U.S. Attorney's office).

47. FDIC v. Mallen, 486 U.S. 230 (1988) (no-notice removal of indicted bank officer); Bob Jones Univ. v. Simon, 416 U.S. 725, 746-48 (1974) (no-notice revocation of tax-exempt status); Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 599-600 (1950) (misbranded but harmless vitamins); Fahey v. Mallonee, 332 U.S. 245, 253-54 (1947)

cases is a strong governmental interest in acting quickly and in the public interest.[48]

In *Fuentes v. Shevin*, the Supreme Court recognized the validity of summary seizures in cases involving "exigent circumstances."[49] *Fuentes* involved constitutional challenges to prejudgment replevin statutes in Florida and Pennsylvania which permitted the seizure of property based solely on the plaintiff's complaint and without any prior notice to the defendant or opportunity for a hearing.[50] The Supreme Court held that the statutes were constitutionally invalid because they failed to provide due process before dispossession of the property.[51] The Court thereby reaffirmed that procedural due process generally requires notice and a hearing prior to the deprivation of a property interest.[52] Significantly, however, the Court also recognized that "there are 'extraordinary situations' that justify postponing notice and opportunity for a hearing."[53]

The Court in *Fuentes* reviewed its prior precedent and discovered three characteristics of such "extraordinary situations:"

> First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[54]

From these characteristics, the Court developed a three-part test for extraordinary circumstances.[55] The Court then determined that the replevin statutes at issue did not meet any of these criteria, noting in

---

(summary seizure of unsound bank); Phillips v. Commissioner, 283 U.S. 589 (1931) (summary tax collection procedures); North Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (diseased poultry in cold storage).

48. 407 U.S. 67 (1972).

49. *Id.* at 91-92.

50. The Florida statute required a hearing on the merits following the seizure, whereas the Pennsylvania law did not.

51. 407 U.S. at 80-93.

52. 407 U.S. at 80, 82 (citing Baldwin v. Hale, 1 Wall. 223, 233 (1864)).

53. 407 U.S. at 90 (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1970)).

54. 407 U.S. at 91.

55. The Court in *Fuentes* and later in *Calero-Toledo* used the term "extraordinary circumstances." However, later circuit court and district court cases used the term "exigent circumstances" to mean the same thing and this Note adopts the latter term. *See, e.g.*, United States v. Property at 850 S. Maple, Ann Arbor, Mich., 743 F. Supp. 505, 510 (E.D. Mich. 1990).

particular that no governmental interest was served by the summary replevin seizures because only private gain was at stake: "state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health."[56]

Additionally, neither replevin statute limited the application of the summary seizure device to special situations demanding prompt action and there were no unusual situations in the cases presented. The statutes simply abdicated "effective state control over state power,"[57] for they allowed private parties to unilaterally invoke state power to replevy goods from another without the participation or review of state officials.[58] Regarding this issue, the Court noted:

> The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, a search warrant is generally issued to serve a highly important governmental need—e.g., the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the State will not issue a search warrant merely upon the conclusory application of a private party. It guarantees that the State will not abdicate control over the issuance of warrants and that no warrant will be issued without a prior showing of probable cause. Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued.[59]

Because both the Congress and the Supreme Court[60] have equated search warrants with warrants for seizure, the distinction drawn in *Fuentes* provides useful analogies in the civil forfeiture context. As discussed in greater detail below, both the civil forfeiture statute and the Forfeiture Project meet all three parts of the *Fuentes* "extraordinary circumstance" test.

In *Calero-Toledo v. Pearson Yacht Leasing Co.*, the Supreme Court applied *Fuentes* to a case involving the seizure of a yacht allegedly used to transport illegal drugs. The Court rejected the contention that due

---

56. Fuentes v. Shevin, 407 U.S. 67, 93 (1972).
57. *Id.*
58. *Id.*
59. *Id.* at 93-94 n.30.
60. United States v. Monsanto, 491 U.S. 600, 615-16 (1989); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 (1973).

process required notice and a hearing prior to the seizure, even though the government had not obtained a judicial finding of probable cause and a warrant before the seizure.[61] Employing the *Fuentes* test, the Court found that: (1) the seizure served significant governmental interests, because it allowed the government to assert in rem jurisdiction over the property, "thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions"; (2) pre-seizure notice and hearing might frustrate the interests served by the statute, since the property seized will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed if advance warning of confiscation were given; and (3) unlike the situation in *Fuentes*, the seizure was by government officials responsible for determining if the seizure was appropriate under the statute, rather than self-interested parties.[62]

In *Richmond Tenants Organization*, the district court and court of appeals cited *Fuentes* and made a passing reference to *Calero-Toledo*, but failed to properly apply either's rationale concerning "extraordinary circumstances" to the forfeiture of public housing leases.[63] First, both courts only recognized a narrow governmental interest in obtaining pre-notice seizure. Second, both courts misapplied an erroneous view of the need for prompt actions discussed in *Calero-Toledo*.[64] Finally, neither court even mentioned that a government official, not a private litigant, is responsible for determining that seizure is necessary and justified in a particular instance. The significance of these errors becomes apparent when the *Fuentes* characteristics and the language in *Calero-Toledo* is applied to the type of no-notice seizures contemplated by the civil forfeiture statute and the Forfeiture Project.

1. The Seizure of Public Housing Units from Tenants Involved in Drug Trafficking is Directly Necessary to Further an Important Governmental and Public Interests.—The government has a general obligation to apprehend criminals, enforce laws, and safeguard the public.[65] To fulfill these obligations, the government has a legitimate interest in maintaining an effective law enforcement system, minimizing related

---

61. 416 U.S. 663 (1974).

62. *Id.* at 679. The Court also noted the distinction between a search warrant and seizure under a writ of replevin made by the *Fuentes* Court. *Id.* n.14 (quoting 407 U.S. at 93-94, n. 30). *See supra* note 22.

63. 753 F. Supp. 607, 609 (E.D. Va. 1990); 956 F.2d 1300, 1307 (4th Cir. 1992) (affirming district court).

64. The district court did discuss an interpretation of *Calero-Toledo* by the U.S. District Court for the Southern District of Illinois in United States v. Parcel I Beginning at Stake, 731 F. Supp. 1348 (1990). 753 F. Supp. at 609. The court of appeals discussed *Calero-Toledo* itself. 956 F.2d at 1307-08.

65. U.S. CONST. preamble.

public expenditures and protecting law enforcement personnel as they carry out their duties.[66] Promoting the government's interest not only eases the burden of its duties, but also directly benefits the general public.[67]

In *Calero-Toledo*, the Supreme Court recognized that the prompt seizure of a yacht used for drug trafficking served a public interest by preventing the further use of the property for drug trafficking while the forfeiture action was pending.[68] Neighborhood residents, whether they live in public or private housing, have a similar important interest in living in an environment free from the dangers of drug trafficking.[69] But tenants of private rental housing have an advantage over public housing tenants in maintaining a drug free environment because private landlords can evict tenants far more easily.[70] One of the editorials in favor of the Forfeiture Project observed: "No one could reasonably subordinate a landlord's right to tell [a drug dealer to] 'Get off my property'. . . . If it's true of privately owned property, *a fortiori* it's true of drug dealers, who occupy their apartments through the generosity of the taxpayer."[71]

Through local public housing authorities, HUD is a landlord to approximately 1.3 million public housing tenants.[72] The United States Housing Act of 1937[73] mandates that HUD assist state and local governments in remedying the chronic shortage of "decent, safe, and sanitary dwellings for families of lower income" and vests the "maximum amount of responsibility" for administration of public housing with local officials.[74] To this end, HUD spent over 5.8 billion dollars on public

---

66. *See Calero-Toledo*, 416 U.S. at 679; United States v. 141st St. Corp., 911 F.2d 870, 875 (2nd Cir. 1990) (finding exigent circumstances under *Fuentes*, the court recognized that "prior notice of the seizure might have hampered efforts to enforce the narcotics laws and increased the risk to police and the community from the seizure.").

67. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (government's interest in conserving fiscal resources and administrative burden does not outweigh a welfare recipient's right to an informal proceeding prior to termination of benefits due to ineligibility).

68. *See* 416 U.S. at 679 and 679 n.14 (describes the apprehension and conviction of criminals as a "highly important governmental need.").

69. *141st Street*, 911 F.2d at 875 (recognizing the interests of neighbors).

70. Jack Kemp, *Letterline: The Poor Have Rights Too*, USA TODAY, June 6, 1990, at 9A.

71. BOSTON HERALD, *supra* note 1; *see also* PHILA. INQUIRER, June 16, 1990, at 8A; John Lofton, *Don't Cry for Criminals' 'Rights' in War on Drugs*, USA TODAY, May 23, 1990, at 10A; *How the LSC Helps Drug Dealers*, WASH. TIMES, July 16, 1990, at D2.

72. *See supra* note 3.

73. 42 U.S.C. § 1437 (1991).

74. 42 U.S.C. § 1437 (1991).

housing in 1991.[75] Moreover, Congress has found that the federal government has a duty to provide public housing that is decent, safe, and free from illegal drugs and has established a grant program for this purpose.[76] During 1991 alone, HUD distributed 140 million dollars in grants specifically directed toward drug enforcement, drug use prevention and education.[77] Local governments also provide a substantial amount of money each year for public housing.[78] Finally, most public housing leases create a contractual duty requiring the housing authority to provide the tenants with a safe environment.[79] Ironically, the plaintiffs in *Richmond Tenants Organization* sued the Richmond Redevelopment and Housing Authority in an effort to get better security from drug-related violence at the same time that the *Richmond Tenants Organization* case was being considered by the district court.[80] The congressional mandate, considerable financial investment, and possible contractual obligations all show that the government has a significant interest in providing safe and drug-free housing for the poor, rather than taxpayer-subsidized housing for drug dealers.

The government's interest was not sufficiently recognized by the district court in *Richmond Tenants Organization*. Nevertheless, when ruling on the Richmond Tenants Organization's challenge to the housing authority's proposed lease changes, the same district judge recognized that the Richmond Redevelopment and Housing Authority has an interest in improving the safety and quality of life in public housing. In *Richmond Tenants Organization v. Richmond Redevelopment and Housing Authority*,[81] decided only 13 days before *Richmond Tenants Organization*

---

75. *See supra* note 3.

76. Congress has also found that:

> (2) public and other federally assisted low-income housing in many areas suffers from rampant drug-related crime;
>
> (3) drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants;
>
> (4) the increase in drug-related crime not only leads to murders, muggings, and other forms of violence against tenants, but also to a deterioration of the physical environment that requires substantial government expenditures; and
>
> (5) local law enforcement authorities often lack the resources to deal with the drug problem in public and other federally assisted low-income housing, particularly in light of recent federal aid to cities.

Public Housing Drug Elimination Pilot Program, 42 U.S.C. § 11901 (1991).

77. The Department of Justice's Office of Juvenile Justice Development Programs also administers a grant program for anti-drug efforts aimed at public housing.

78. *See generally* 42 U.S.C. § 1437 (1991); *see also supra* note 3.

79. *See, e.g.*, Richmond Tenants Org., Inc. v. Richmond Redevelopment and Hous. Auth., 751 F. Supp. 1204 (E.D. Va. 1990).

80. Alan Cooper, *Tenants Sue for Better Security*, RICHMOND NEWS LEADER, June 26, 1990, at 7.

81. 751 F. Supp. 1204 (E.D. Va. 1990).

v. Kemp, the court acknowledged that the 14,000 tenants of Richmond public housing "are the victims of an extraordinarily high incidence of crime, much of which is connected to illegal drug traffic."[82] In fact, the district court upheld various lease provisions, including a ban on possessing firearms in public housing and an emergency eviction clause which could require tenants to vacate their units within twenty-four hours of a reported threat to the life, health, or safety of other tenants or housing authority employees.[83] The district court deferred to the housing authority's judgement in drafting lease provisions based on the fact that the provisions were rationally related to a legitimate housing purpose.[84] Consequently, the district court's subsequent decision regarding lease seizures paradoxically ignores the same dire situation in Richmond public housing and the same important governmental interest in addressing this problem.

Similarly, the court of appeals failed to mention the severe drug problem in public housing or its consequences for innocent tenants, and it did not acknowledge that an important governmental interest existed. These omissions clearly demonstrate a lack of comprehension of the terrible circumstances which public housing tenants endure daily.

2. There is a Special Need for Very Prompt Action When a Drug Trafficking Problem Appears in Public Housing.—The strong governmental interest in upholding the law, protecting citizens and law enforcement officers, fulfilling congressional mandates, and guarding the substantial investment in public housing translates into a "special need for very prompt action" as identified by the Supreme Court in *Fuentes* and as applied to civil forfeiture in *Calero-Toledo*.[85] The *Calero-Toledo* opinion focused on whether pre-seizure notice might frustrate the interests served by the statute. For example, the property involved can often be removed, destroyed, or concealed.[86] Such could easily be the case with a public housing unit. Although a housing unit is immobile, the structure may be damaged and destroyed or its contents removed, including evidence needed for a criminal conviction, if a drug trafficking tenant is

---

82. *Id.* at 1207. The court also said that "[t]he murder rate in RRHA housing is very high" and that "[t]enants are routinely intimidated by gunfire and the presence of youths with guns." *Id.*

83. The court also upheld a section which holds tenants responsible for the actions of "other persons on the premises" who disturbed neighbor's peaceful enjoyment of the premises. *Id.* at 1210. Provisions which would have prohibited any type of weapon on public housing grounds and made the use or sale of drugs off of public housing cause for eviction were the only two which the court found to be unreasonable. *Id.* at 1204-05, 1209-14.

84. *Id.* at 1205-06.

85. *See supra* notes 62-64 and accompanying text.

86. 416 U.S. 663 (1974).

given notice prior to the seizure. In this way, prior notice can hamper law enforcement efforts and substantially increase the risk of harm to the police and the community.[87]

The district court in *Richmond Tenants Organization v. Kemp* did not apply *Calero-Toledo* itself, but instead looked to another district court's interpretation of that case in *United States v. Parcel I Beginning at Stake*,[88] which held that to show a need for very prompt action, the government must show *either* that the "pre-hearing seizure is required to prevent further unlawful activity" or "to prevent dissipation or concealment of the property."[89] This interpretation of *Calero-Toledo* unduly focuses on mobility factors and gives insufficient weight to broader governmental interests like the protection of the substantial investment in public housing. Yet even under this interpretation, the situation in public housing easily meets both criteria. Incredibly, while using language almost identical to *Calero-Toledo*, the district court found that the government's interest in preventing continued drug-related activity did not meet either criteria.[90] Instead, the district court, and later the court of appeals, concentrated on the fact that the *Calero-Toledo* case involved the seizure of a highly mobile yacht, whereas a housing unit obviously cannot be moved.[91] However, *Calero-Toledo* did not turn on the mobility of the yacht; rather, the Supreme Court merely stated that concealment, destruction or removal "will often be" present, not that the property in question must be capable of removal.[92] Thus, the *Richmond Tenants Organization v. Kemp* courts' attention to the mobility issue was misplaced. Moreover, in later formulations of *Calero-Toledo*, the Supreme Court has omitted the mobility factor, stressing instead the "governmental purposes" served by immediate seizure and the "unworkability" of a requirement for a pre-seizure hearing in all cases.[93]

---

87. United States v. 141st St. Corp., 911 F.2d 870, 875 (2nd Cir. 1990) (upholding no-notice seizure of an apartment building and recognizing that in the situation under consideration prior notice could have meant greater risk of harm to police and neighbors).

88. 731 F. Supp. 1348 (S.D. Ill. 1990).

89. 753 F. Supp. 607, 609 (E.D. Va. 1990).

90. *Id.* at 609.

91. *Id.* (citing United States v. 850 S. Maple, Ann Arbor, Mich., 743 F. Supp. 505, 510 (E.D. Mich. 1990)); 956 F.2d 1300, 1307 (4th Cir. 1992).

92. 416 U.S. 663, 679 (1974).

93. *See* United States v. $8,850 in U.S. Currency, 461 U.S. 555, 562 n.12 (1983) ("The government interests found decisive in *Pearson Yacht* are equally present in this situation: the seizure serves important governmental purposes; a pre-seizure notice might frustrate the statutory purposes; and the seizure was made by government officials rather than self-motivated parties.").

In a subsequent decision, the Court characterized *$8,850 in U.S. Currency* in the following way: "We reasoned that [a pre-seizure hearing] requirement would make customs

Both of the *Richmond Tenants Organization v. Kemp* courts also put great stock in the fact that a residence was being seized. Following the Second Circuit and another district court decision, the district court said that in addition to being immobile, homes deserve special protection because the Constitution affords individuals an expectation of "privacy and freedom from governmental intrusion."[94] The court of appeals also emphasized a special expectation for privacy in homes.[95] What the *Richmond Tenants Organization v. Kemp* courts overlooked is that the homes of innocent victims living in public housing also deserve protection. The court of appeals expressly stated that drug activity in public housing does not always constitute an "extraordinary situation which requires prompt governmental action to protect other innocent tenants from dangerous drug activities in their buildings."[96] In contrast, the Fourth Circuit has stated previously: "while we recognize that the home has a protected place in our jurisprudence, . . . we cannot sanction a rule that gives favored protection to drug dealers who choose to deal directly from their homes."[97] Significantly, the statutory civil forfeiture procedure does not distinguish between real and personal property.[98]

Furthermore, the Supreme Court has emphasized that "private residences are places in which the individual normally expects privacy free of governmental intrusion *not authorized by a warrant* . . . ."[99] The Forfeiture Project is consistent with the traditional Fourth Amendment protection given to homes because it requires that a warrant supported by probable cause be obtained prior to seizure. Indeed, the owner of seized property has essentially the same remedies available as an arrestee: the owner can challenge the legality of the seizure before a judicial officer, or sue to hold accountable the law enforcement officials who made an illegal seizure.[100] Recognizing this, the Eleventh Circuit has ruled that the forfeiture statute procedures complied with the Fourth Amendment and provided "the owner of the property [with] all of the process that [is] due."[101]

---

processing entirely unworkable and also found that because 'the seizure serves important governmental purposes[,] a preseizure notice might frustrate the statutory purpose . . . .'" United States v. Von Neumann, 474 U.S. 242, 249, n.7 (1986).

94. 753 F. Supp. at 609 (citing Livonia, 889 F.2d at 1264 (citing United States v. Karo, 468 U.S. 705, 714 (1984))); *850 S. Maple*, 743 F. Supp. at 510.

95. *Richmond Tenants Org.*, 956 F.2d 1300, 1307-08 (4th Cir. 1992).

96. *Id.* at 1308.

97. United States v. Santoro, 866 F.2d 1538, 1542-43 (Cir. 1989) (citations omitted).

98. 42 U.S.C. § 881; United States v. Property Located at 4880 S.E. Dixie Highway, 838 F.2d 1558, 1561 (11th Cir. 1988).

99. *Karo*, 468 U.S. at 714 (emphasis added).

100. United States v. Valdez, 876 F.2d at 1554, 1559 (11th Cir. 1989); *see generally* 42 U.S.C. § 881.

101. 876 F.2d at 1560, n.12.

3. The Person Initiating the Seizure is a Government Official Responsible for Determining, Under the Standards of a Narrowly Drawn Statute, that the Seizure is Necessary and Justified.—The civil forfeiture statute allows the U.S. Attorney to seize a leasehold by obtaining a warrant from a magistrate based upon a finding of probable cause.[102] The Supreme Court has noted that obtaining a warrant would satisfy the third part of the *Fuentes* test, as such a procedure "guarantees that the State will not abdicate control over the issuance of warrants and . . . no warrant will be issued without a prior showing of probable cause."[103] Neither the district court nor the court of appeals in *Richmond Tenants Organization v. Kemp* discussed the significance of the warrant requirement in this context.

Two government officials are relevant to this issue: the U.S. Attorney and the magistrate. In the initial stages of a case, the U.S. Attorney will consult the forfeiture statute and review DOJ forfeiture policy to determine if a case should be pursued. In making this judgment, the role of the government attorney is not simply that of an adversary. Rather, as the Supreme Court has observed, the government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . is not that it shall win a case, but that justice shall be done."[104] As such, a U.S. Attorney is a "servant of the law" with a "twofold aim . . . that guilt shall not escape or innocence suffer."[105] The *Calero-Toledo* Court upheld the no-notice seizure of a yacht under a Puerto Rican statute substantially the same as the federal civil forfeiture law in part because, unlike the situation in *Fuentes*, the seizure was not initiated by self-interested parties, but rather by government officials responsible for determining if the seizure was appropriate under the statute.[106]

However, the U.S. Attorney is not free to seize property and remove residents at will. Whatever discretion the U.S. Attorney has in deciding whether or not to pursue a case, the warrant requirement ensures that no lease will be seized, nor any tenant removed, without a finding of probable cause to believe that the leasehold is subject to forfeiture. Thus, to obtain a warrant, the U.S. Attorney must request that a magistrate apply well-established standards to determine if there is probable cause to believe that the premises are being used to facilitate drug

---

102. *See* 21 U.S.C. § 881 (1990).

103. 407 U.S. at 94, n.30.

104. Berger v. United States, 295 U.S. 78, 88 (1935).

105. Singer v. United States, 380 U.S. 24, 37 (1965) (citing *Berger*, 295 U.S. at 88).

106. 416 U.S. 633, 679 (1974).

trafficking.[107] This preliminary procedure plainly satisfies the third *Fuentes* requirement.

C. The Civil Forfeiture Statute and the Forfeiture Project Satisfy the Balancing Test for Procedural Due Process Established in Mathews v. Eldridge[108]

As defined in *Fuentes*, any seizure conducted in public housing under the civil forfeiture statute or the Forfeiture Project qualifies as an exigent circumstance. The exigent circumstances concept was used by both the district court and court of appeals in *Richmond Tenants Organization v. Kemp* and the Second Circuit in *Livonia* to define when seizures could take place with a warrant. However, the concept was first developed in Fourth Amendment jurisprudence to define the circumstances in which seizures could take place *without* a warrant.[109] These Fourth Amendment cases hold that, absent exigent circumstances, the government must obtain a warrant prior to seizure, and that when the government has a warrant, exigent circumstances are irrelevant. Because the Forfeiture Project and the civil forfeiture statute both utilize a warrant to seize property, the Fourth Amendment guarantee is satisfied.[110]

Moreover, even if the government could not meet the *Fuentes* test for exigent circumstances, due process still would not mandate a prior adversary hearing. The entire civil forfeiture procedure, including the warrant before temporary removal and the full civil action afterwards, satisfies the constitutional balancing test in *Mathews v. Eldridge*. In *Mathews*, the Supreme Court used a balancing test to uphold an administrative procedure for termination of disability benefits that did not require a prior hearing.[111] Under the *Mathews* balancing test, three factors must be considered: (1) the significance of the property interest at stake; (2) the risk of erroneous deprivation and whether the procedure adequately protects the property interest; and, (3) the government's interest, including the burden extra procedures would entail.[112]

---

107. United States v. 141st St. Corp., 911 F.2d 870, 875 (2nd Cir. 1990) (upholding the no-notice seizure of a private apartment building based on a finding of exigent circumstances).

108. 424 U.S. 319 (1976).

109. Payton v. New York, 445 U.S. 573, 590, 599 (1980); G.M. Leasing Corp. v. United States, 429 U.S. 338, 358 (1977).

110. United States v. Karo, 468 U.S. 705 (1984) (requiring a warrant prior to official entry into homes).

111. 424 U.S. at 349.

112. 424 U.S. at 335; *see also* Goss v. Lopez, 419 U.S. 565, 579 (1975) ("the timing and content of notice and nature of hearing will depend on appropriate accommodation of the competing interests involved.").

1. The Tenant has Only a Limited Interest in Uninterrupted Occupancy.—The tenant's property interest involved in a public housing leasehold seizure can be significant. However, as in *Mathews*, because a tenant whose unit is seized will be restored to the unit if the tenant ultimately prevails in a challenge to the seizure, the tenant's sole interest is in the uninterrupted occupation of the unit.[113] When the government enters into an occupancy agreement with the tenant, as is often the case, this interest disappears. Also, if the tenant is arrested at the time of the seizure, the issue of his interest in occupying the unit is likely to be moot. Moreover, the Forfeiture Project provided for the welfare of innocent family members and belongings. On this issue, the district court in *Richmond Tenants Organization v. Kemp* simply stated that the eviction of a tenant prior to a forfeiture trial "constitutes a harm of major proportions," and did not analyze the actual property interest involved.[114] Shockingly, not only did the court of appeals fail to confront the property interest issue, it never even mentioned the landmark *Mathews* decision. An examination of a tenant's property interest in uninterrupted occupancy of the unit reveals that just as a showing of probable cause is sufficient to accommodate private interests when the government executes a search or arrest warrant, it also does so in the case of seizure.

As explained in *Mathews*, the possible length of wrongful deprivation is also an important factor in assessing the impact of official action on private interests.[115] In the case of civil forfeiture, a tenant can trigger the rapid filing of a forfeiture action. A tenant may file an equitable action seeking a court order to compel the filing of the forfeiture action or return of the seized unit.[116] Alternatively, a tenant may contend that the seizure was improper and file a motion under Federal Rules of Criminal Procedure 41(e) for a return of the seized property.[117] Finally, a tenant may petition the U.S. Attorney for expedited release of the unit if the tenant can establish what essentially amounts to an "innocent owner" defense.[118]

---

113. 424 U.S. at 340.

114. 753 F. Supp. 607, 610 (E.D. Va. 1990).

115. 424 U.S. at 341 (quoting Fusari v. Steinberg, 419 U.S. 379, 389 (1975)).

116. United States v. $8,850 in U.S. Currency, 461 U.S. 555, 569 (1983).

117. *Id.*

118. The petitioner must establish:

(1) The owner has a valid, good faith interest in the seized conveyance as owner or otherwise;

(2) The owner has statutory rights or defenses that would show to a substantial probability that the owner would prevail on the issue of forfeiture;

(3) The owner reasonably attempted to ascertain the use of the conveyance in a normal and customary manner; and,

(4) The owner did not know or consent to the illegal use of the conveyance;

Federal civil forfeitures are governed by the Fifth Amendment due process requirement that tenants be afforded a post-seizure hearing on the forfeiture of the subject property "at a meaningful time."[119] In *United States v. $8,850 in U.S. Currency*, the Supreme Court established a balancing test for determining whether a delay in forfeiture proceedings after the property has been seized is unreasonable and thus unconstitutional.[120] The length of the delay, the reason for the delay, the claimant's assertion of the right to a hearing, and the prejudice to the claimant because of the delay are the proper factors to be considered by a court deciding this question.[121] The Court's ruling in *$8,850 in U.S. Currency* and its balancing test imply that delays can occur which are either reasonable or unreasonable, but the mere fact that a delay can occur does not render the statute or the Forfeiture Project invalid.

2. The Warrant Requirement Provides an Adequate Procedure to Limit the Risk of an Erroneous Deprivation.—The second *Mathews* factor requires an assessment of the risk of error in a judicial finding of probable cause and the value of providing additional procedures.[122] The plaintiffs in *Richmond Tenants Organization v. Kemp* contended that there was still a high risk of erroneous seizures based on insufficient evidence, mistakes or lies. The district court agreed, stating: "[w]ithout an adversarial hearing at which the accused can confront and cross-examine his accusers, the accused has no means of ferreting out mistaken or deliberately false testimony."[123] Once again the court of appeals did not discuss the subject. Both courts overlooked the fact that a probable cause finding is deemed reliable enough to issue an arrest or search warrant.[124] Further, the very reason for requiring a warrant is to allow an impartial magistrate to assess the credibility or sufficiency of the evidence and limit the possibility of error. A questioning of the sufficiency of a magistrate's finding of probable cause is contrary to well established precedent.[125] Following the district court's logic would require an absurd restructuring of the criminal justice system in order to allow a "mini-

---

or in the event that the owner knew or should have known of the illegal use, the owner did what reasonably could be expected to prevent the violation.

21 C.F.R. § 1316.95 (1991).

119. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

120. 461 U.S. 555, 564 (an eighteen-month delay was not unreasonable given the circumstances involved).

121. *Id.* at 564 (this test was taken from Barker v. Wingo, 407 U.S. 514, 530 (1972), which involved a criminal defendant's right to a speedy trial).

122. 424 U.S. 319, 335 (1976).

123. 753 F. Supp. at 610.

124. 753 F.Supp. 607, 610 (E.D. Va. 1990).

125. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 236 (1983) ("A magistrate's finding of probable cause should be paid great deference by reviewing courts.") (quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)).

trial" on the issue of whether or not an accused should be arrested. Moreover, due process requirements must be determined by "the risk of error inherent in the truthfinding process as applied to the generality of cases" rather than the "rare exceptions."[126]

A pre-seizure hearing would have little value compared to the great burden it would place on the government and the court system. The cost and time involved in providing what essentially amounts to two trials for each seizure and forfeiture would be prohibitive for U.S. Attorneys, magistrates, and district courts. A seizure may only temporarily remove tenants from their unit because the ultimate disposition of the case is determined at the forfeiture trial. As in a criminal case, a probable cause finding supports the warrant and more extensive due process safeguards are provided at trial, prior to final judgement. According to the *Mathews* Court, where elaborate post-deprivation procedures are available, the "ordinary principle" is that "something less than an evidentiary hearing is sufficient prior to adverse administrative action."[127] In those circumstances, the Court has generally required that pre-deprivation procedures be designed to provide a reasonably reliable basis for ascertaining that the facts justify governmental action.[128] Thus, the combination of a judicial probable cause finding and a prompt, complete trial after seizure is constitutional because it provides a sufficiently reliable safeguard to permit a temporary deprivation of property.

3. The Government and the Public have Important Interests which Justify Pre-hearing Seizures.—The third factor in the *Mathews* balancing test is substantially the same as the first part of the *Fuentes* test: assessing the government's interest in pre-notice seizure. As discussed above, the government has what the Supreme Court has identified as "highly important" interests in upholding the law, preventing the continuation of drug-related activity, and protecting law-abiding citizens.[129] Moreover, HUD and local public housing authorities also have important governmental interests due to the Congressional mandate to provide safe, decent and drug-free housing for the poor, similar obligations which attach to the federal and local governments' role as landlord, and substantial investments of federal and local tax dollars in public housing.[130]

In order to fulfill these obligations, the government has an additional interest in utilizing the method of seizure which most efficiently and effectively accomplishes the goal of eliminating drug trafficking from

---

126. *Mathews*, 424 U.S. at 344.

127. 424 U.S. at 343.

128. Mackey v. Montrym, 443 U.S. 1, 13 (1979) (citations omitted).

129. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 679 n.14 (1973) (quoting *Fuentes*, 407 U.S. 67, 93-94 n.30 (1972)).

130. *See supra* notes 65-84 and accompanying text.

public housing. A no-notice seizure executed upon a finding of probable cause will not only remove drug dealers quickly, but will likely act as a deterrent to future drug sales. As Ms. Mary Baldwin, a public housing tenant and the President of the Rockwell Gardens Tenants Council in Chicago, stated: "When you move in, they tell you [sic] are responsible for what happens, so it isn't any secret."[131]

The *Mathews* test specifically considers administrative burdens and other societal costs as legitimate governmental concerns.[132] The rights of public housing tenants to live in a safe environment are a substantial government concern.[133] Not only would requiring an adversarial hearing prior to seizure put a great burden on overworked government attorneys and courts, but the resulting delay would also mean that "those likely to be found undeserving in the end" would be occupying public housing instead of someone who does deserve it.[134] Ultimately, the government should be able to act to advance important public interests even though it deprives someone of property or liberty without a prior hearing, so long as adequate post-deprivation process provides an adequate safeguard against arbitrary seizures.[135]

The district court in *Richmond Tenants Organization v. Kemp* only acknowledged a narrow governmental interest in obtaining pre-notice seizure of a unit, believing that broader interests could be served by other means, such as a pre-seizure adversarial hearing.[136] The court of appeals failed to discuss any governmental interest. Instead, it focused on a "least restrictive alternative" analysis, citing *Livonia* and *Kingsley* and stating that the "governmental objective in evicting drug dealers from public housing may be accomplished by different procedures."[137] Nevertheless, the civil forfeiture statute plainly authorizes seizures, which may or may not include removal of the tenant, without prior notice. The policy decision that such procedures are more effective in curbing

---

131. Andrew Fegelman, *U.S. Law Helps CHA Fight Drugs*, CHI. TRI., June 27, 1990, at 13C.

132. Matthews v. Eldridge, 424 U.S. 319, 319 (1976).

133. A tenant in Macon, Georgia, who has lived in public housing for thirty-eight years, put it well when she voiced her support for the Project: "During the night around these two buildings, there's traffic all the time," Hardeman said. "This used to be one of the nicest neighborhoods in the city . . . and I think we can make it good again, sure do." Dan Maley, *Public Housing Raids Result in Three Arrests*, MACON TELEGRAPH AND NEWS, June 26, 1990, at 1B.

134. 424 U.S. at 348.

135. United States v. 141st St. Corp., 911 F.2d 870, 876 (2nd Cir. 1990) (quoting J. Nowak et al., CONSTITUTIONAL LAW 560 (2d ed. 1983) (footnote omitted)).

136. 753 F. Supp. 607, 610 (E.D. Va. 1990) (quoting United States v. Premises and Real Property Located at 4492 Livonia Rd., 889 F.2d 1258, 1264 (2d Cir. 1989)).

137. *Richmond Tenants Org.*, 956 F.2d 1300, 1308 (4th Cir. 1992).

drug trafficking than other means should be made by Congress, not a court. The purpose of the third *Mathews* factor is not to second-guess congressional policy decisions, but merely to assess the extent to which additional due process procedures would burden the government. Given the important governmental and public interests at stake, and the enormous burden which would be placed on the government and courts, requiring a hearing prior to seizure would severely compromise the government's efforts to remove drug dealers from public housing.

III. Conclusion

HUD Secretary Jack Kemp once asked a tenant of Philadelphia public housing if she felt HUD's efforts to get drug dealers out of public housing violated her constitutional rights. She replied: "Before you came along, I didn't *have* any rights."[138] Indeed, the rights of law-abiding citizens, who are victims of the disruptions and violence caused by neighborhood drug dealers, are too often subsumed to the rights of the wrong-doer.[139] The wholly inadequate *Richmond Tenants Organization v. Kemp* decisions are prime examples. The district court and the court of appeals both disregarded highly important governmental and public interests in preventing further drug-related activity, enforcing the law, conducting law enforcement operations safely and efficiently, fulfilling the Congressional mandate to provide safe public housing, and protecting the substantial financial investment of tax dollars. Sadly, the effect of the rulings is to frustrate government efforts to efficiently rid public housing of drug dealers, leaving them free to oppress and terrorize tenants in Richmond and across America.

The district court and court of appeals also ignored the special function of a U.S. Attorney. Under the American ideal of separation of powers, the initial task of deciding whether or not to proceed with a case, and how to proceed based on an assessment of the circumstances,

---

138. Kemp, *supra* note 2 (emphasis in original).

139. Jack Kemp, *Kemp: Keep Drugs Out of Housing Projects*, St. Louis Post-Dispatch, June 3, 1990, at 10 ("I think it's time we recognize that the rights of innocent people to live in a safe, drug-free community are just as important as the rights of the drug thugs who terrorize public housing."); Kemp, *supra,* note 70 at 9A ("Why should the rights of drug-dealing criminals be greater than those of the decent residents of public housing?").

The general public seems to agree:

> Barring a successful appeal by HUD, Williams' order effectively prevents the raids from taking place. To put it differently, Williams' order effectively gives drug criminals the right to continue behaving as they like in housing paid for by the taxpayers. Just one more case of a federal judge more concerned with the 'rights' of dangerous felons than with the rights of the public.

Boston Herald, *supra* note 1, at 6.

rightfully belongs to each individual U.S. Attorney.[140] The traditional role of the government attorney, which was reaffirmed by Congress in the civil forfeiture statute when it provided options under which a government attorney may choose to proceed based on the circumstances, should not be preemptively stripped away by a court. The duty of the court is "not that of policing or advising legislatures or executives," but simply "to decide the litigated case and to decide it in accordance with the law."[141]

Finally, both court decisions challenged the sufficiency of the historically recognized probable cause standard. Under the civil forfeiture statute and the Forfeiture Project, a seizure is conducted only after a warrant supported by a judicial finding of probable cause is issued. Such a finding is adequate to temporarily deprive arrestees of their liberty and to search homes. When the limited interest of the tenant in uninterrupted occupation of their housing unit is balanced against the multitude of important governmental and public interests served by the Forfeiture Project, a warrant is certainly sufficient to safeguard a tenant's due process rights. The district court's and court of appeals' rulings that extra due process procedures are required before the government can remove a drug dealer from public housing is bewildering and without support in Supreme Court precedent. As Jack Kemp has cogently observed: "The only 'public housing' drug dealers deserve is jail."[142]

---

140. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (prosecutorial discretion is unreviewable by a court).

141. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 4-10 (1961).

142. *HUD and Justice Announce Strike Against Drug Dealers in Public Housing*, News Release, Department of Housing and Urban Development, June 25, 1990, at 1.

A Nation Divided: By What Standard Should Fourth Amendment Seizure Findings Be Reviewed on Appeal?

BRENT E. KIDWELL*

INTRODUCTION

The scene is familiar in federal district courts in the United States.[1] A criminal defendant, charged with a possessory offense, argues that he was illegally seized by law enforcement officers. The defendant asserts that the evidence discovered during the search following this illegal "seizure" is inadmissable to prove his guilt. The defendant argues that the exclusionary rule prevents the use of evidence discovered during an illegal search or seizure to prove the guilt of an accused.[2]

No single issue of a criminal trial is more important than the admissibility of evidence seized from a defendant if a defendant is charged with a possessory offense. If the evidence is inadmissable, the prosecution is generally unable to prove the elements of the charged crime. Conversely, the admission of evidence discovered during a police encounter with the defendant is often sufficient to convict the accused.[3] In criminal prosecutions, various constitutional and statutory provisions control the admissibility of evidence. The interaction between law enforcement and citizens is generally regulated by the Fourth Amendment.[4] The exclu-

---

* J.D. Candidate, 1993, Indiana University School of Law—Indianapolis; A.B., 1990, Indiana University—Bloomington.

1. The scene is equally familiar in every state court. However, this Note is confined to an analysis of the standard of review applied by United States courts of appeal of federal district court determinations that a criminal defendant was "seized" within the meaning of the Fourth Amendment. Generally, state law is applied by state courts to determine the degree of deference afforded to lower court findings. It is important to note, however, that state court standards of review could be affected if the Supreme Court were to hold that the constitution guarantees a certain standard of review of Fourth Amendment determinations.

2. *See* Weeks v. United States, 232 U.S. 383 (1914). *See also infra* text accompanying note 22.

3. This is especially true if the charged crime is a possessory offense which includes actual possession of the item as an element of the crime. *See, e.g.*, 18 U.S.C. § 474 (1988) (possession of plates for purpose of counterfeiting obligations or securities); 18 U.S.C. § 1708 (1988) (possession of stolen mail); 21 U.S.C. § 841(a)(1) (1988) (possession of controlled substance with intent to distribute).

4. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath of affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S CONST. amend. IV.

sionary rule, a judicially created remedy for violations of the Fourth Amendment,[5] prohibits evidence seized in violation of the Fourth Amendment from being used to prove a defendant's guilt.[6] Thus, establishing a defendant's innocence or guilt often depends on whether the law enforcement officers complied with the Fourth Amendment.

Criminal defendants frequently assert they were unlawfully "seized" during an encounter with law enforcement officers.[7] In evaluating this contention, the court must determine if a seizure occurred, and, if so, whether the seizure satisfied the requirements of the Fourth Amendment. If the police acted outside the scope of the Fourth Amendment, the defendant was illegally seized. Any evidence discovered during the search following this illegal seizure may not be used to prove the defendant's guilt.[8] These issues and arguments are generally raised in a pre-trial motion to suppress.

If a defendant loses the suppression motion and is ultimately convicted, the defendant may, on appeal, allege that the trial court's evidentiary ruling was erroneous. Often, the defendant will argue that the finding on the legality of the seizure was incorrect. The argument, on appeal, may focus on the correctness of the trial court's decision that the defendant was or was not "seized" during the encounter with law enforcement and, ultimately, whether that "seizure" was lawful.

At this point, a question arises. The appeals court must decide the applicable standard for reviewing the trial court's seizure findings. Some courts of appeal review the determination de novo; accordingly, the court independently evaluates the record and draws its own inferences from the facts without deferring to the trial court's findings. Other courts defer to the trial court's findings and will reverse those findings only if clearly erroneous. This division among the circuits exists, in large part, because the United States Supreme Court has failed to decide which standard is correct. A uniform standard of review does not exist for federal appeals courts to use to determine if a trial court correctly applied a vital guarantee of the Bill of Rights.

This inconsistency in federal criminal procedure prejudices both the accused and the government.[9] If an appeal of a trial court's seizure

---

5. *See generally* WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (2d ed. 1987).

6. *See infra* text accompanying note 22.

7. *See infra* text accompanying note 13.

8. Most likely this is a search incident to the arrest. *See* Chimel v. California, 395 U.S. 752 (1969).

9. As indicated above, this inconsistency is also prevalent in the state judicial systems. The standards of review applied by state appellate courts when reviewing trial court seizure determinations varies. *See, e.g.,* People v. Williams, 756 P.2d 221 (Cal.

determination occurs in a circuit which reviews those determinations de novo, the appealing party will, in practical terms, receive a new hearing on the suppression motion. However, if that same trial court finding is appealed in a circuit which defers to the trial court's decision, that determination is practically irreversible because it is only altered if clearly erroneous. This variable treatment of parties to a criminal action is unpalatable in the federal judicial system.[10]

This Note first reviews Fourth Amendment law to provide a background for further discussion of the seizure issue. After considering the procedural posture in which a Fourth Amendment claim is raised, the relationship of the exclusionary rule to the Fourth Amendment is reviewed. This Note analyzes the seizure determination in light of the policy considerations which determine the appropriate standard of review. The distinction between law, fact, and ultimate fact is applied to the seizure issue to determine if a test exists from which an appropriate standard of review can be discerned. Further, the doctrine of constitutional fact will be explored as it relates to the Fourth Amendment considerations at issue in a seizure determination. The tests which evolve from these doctrines will be synthesized to create a framework for analyzing the seizure determination. Inherent in each analysis are considerations of judicial economy, efficiency, and fairness. Ultimately, this framework demonstrates that a trial court's seizure determination should receive limited review on appeal and only be disturbed if clear error exists.

I. Fourth Amendment Doctrine

A. "Seizure" Defined

Unreasonable searches and seizures of citizens are prohibited by the Fourth Amendment.[11] However, not all contacts between law enforcement

---

1988) (de novo review); People v. Erskin, 285 N.W.2d 396 (Mich. Ct. App. 1979) (clearly erroneous); State v. Storvick, 428 N.W.2d 55 (Minn. 1988) (de novo review).

10. These variations are practically unable to encourage forum shopping in federal criminal actions. The general venue provision for criminal proceedings requires that "the prosecution shall be had in a district in which the offense was committed." Fed. R. Crim. P. 18. The defendant may move to transfer the proceeding to another district to avoid prejudice, Fed. R. Crim. P. 21(a), or for purposes of convenience pursuant to Fed. R. Crim. P. 21(b). The defendant is thus quite limited in selecting alternative forums, except, of course, the forum in which to initially commit the crime.

11. "We have long understood that the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person." California v. Hodari D., 111 S. Ct. 1547, 1549 (1991) (quoting Henry v. United States, 361 U.S. 98, 100 (1959)).

For a general but thorough discussion of the Fourth Amendment, see Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1970).

officers and citizens are "seizures" which invoke the protection of the Fourth Amendment.[12] If a seizure occurs, the Fourth Amendment requires that it be reasonable.[13] In *Terry v. Ohio*[14] the Supreme Court held that a person is "seized" and the protections of the Fourth Amendment apply if "a police officer accosts an individual and restrains his freedom to walk away . . . ."[15] The Court later reaffirmed this standard and formulated an objective test in *United States v. Mendenhall*,[16] in which it held that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[17] This test remains the yardstick against which police encounters with citizens are measured to determine if a seizure occurred and the Fourth Amendment applies.[18]

---

12. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) ("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.").

13. United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

14. 392 U.S. 1 (1968). The facts of *Terry*, now famous, are instructive of the factors which the Supreme Court considers in determining that a defendant is seized. A police officer approached the defendant and two other men after observing their actions for some time. Upon approaching the men, the officer asked for identification. One suspect responded with a mumble, causing the officer to physically grab Terry, spin him around, and pat-down the outside of his clothing. The Court stated, "In this case there can be no question, then, that Officer McFadden 'seized' petitioner . . . when he took hold of him and patted down the outer surfaces of his clothing." *Id.* at 19.

15. *Id.* at 16.

16. 446 U.S. 544 (1980). This case involved an airport stop of a person who matched a "drug courier profile." Such profiles are used by many law enforcement narcotics units to identify likely drug couriers. Here, federal drug agents approached the defendant in an airport concourse, identified themselves and asked to see the defendant's identification. The facts in this case indicated to the Court that the defendant was not "seized" during the encounter with law enforcement officers. The Court stated that:

> The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.

Id. at 555.

17. *Id.* at 554 (footnote omitted). The general use of "reasonableness" tests is heavily criticized. *See* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988) (criticizing the Supreme Court for foregoing categorical rules and objective tests and resorting instead to "reasonableness" and "balancing" tests).

18. This standard was announced in the plurality opinion of *Mendenhall*, written by Justice Stewart, in which only one other Justice joined. However, in the subsequent case of Florida v. Royer, 460 U.S. 491 (1983), a majority of the court adopted this reasonable person test (plurality of four justices and Justice Blackmun's dissent). For cases

Under this test, a court must analyze the factual circumstances of the encounter with law enforcement. In *Mendenhall*, the Supreme Court listed several facts which support the finding that a seizure occurred: the presence of several police officers, the display of weapons by the officers, physical touching of the suspect, and the use of language or a tone of voice by law enforcement which indicates the suspect may not leave.[19] These factors substantiate the inference that a reasonable person would not have felt free to leave. Subsequent cases have identified other police actions which support a finding that a citizen was seized.[20] However, the Court repeatedly emphasizes that the facts of each encounter must be independently scrutinized when the objective *Mendenhall* test is applied.[21]

B. The Exclusionary Rule

Evidence procured by the police as a result of an unlawful search of a suspect is inadmissable to prove the guilt of the suspect in a later trial.[22] This rule is not constitutionally required, but rather is a judicially created remedy for violation of a defendant's constitutional rights.[23] Evidence seized during a search following an illegal seizure violates the Fourth Amendment and falls within the scope of the exclusionary rule's

---

following *Mendenhall* which applied this reasonable person standard, see generally California v. Hodari D., 111 S. Ct. 1541, 1550-51 (1991); Michigan v. Chesternut, 486 U.S. 567, 573 (1988) ("The Court has since embraced [the Mendenhall] test."); INS v. Delgado, 466 U.S. 210, 215 (1984).

19. *Mendenhall*, 446 U.S. at 554.

20. *See* Florida v. Royer, 460 U.S. 491 (1983) (seizure occurred when police stopped defendant in an airport, identified themselves as narcotics agents, asked for, examined, and retained airline ticket, and asked defendant to follow them to police room without indicating he was free to leave.); Michigan v. Summers, 452 U.S. 692 (1981) (police stopping defendant as leaving house for which search warrant issued and requiring defendant to return to house while search conducted was seizure); Brown v. Texas, 443 U.S. 47 (1979) (police officer exiting his vehicle and detaining defendant to identify defendant and explain defendant's reason for being in location was a seizure).

21. *See* Michigan v. Chesternut, 486 U.S. 567, 573-74 (1988).

22. Weeks v. United States, 232 U.S. 383, 393 (1914). ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value. . . ."). *Accord* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (extending exclusionary rule to indirect as well as direct products of illegal invasions of privacy). For a general discussion of the exclusionary rule and its many permutations, see generally LAFAVE, *supra* note 5, § 1.1.

23. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

remedy.[24] If the evidence is a fruit of an illegal seizure, the evidence may not be used by the prosecution to prove the defendant's guilt of the crime charged.[25]

C. Procedural Exclusion of Evidence

Criminal procedure in the federal courts is governed by the Federal Rules of Criminal Procedure.[26] Under these rules, "[a] motion to suppress evidence may be made in the court of the district of trial."[27] A motion to suppress evidence must be raised prior to trial.[28] Failure to raise the issue before trial is considered a waiver and prevents the issue from being raised at a later time.[29] If a search or seizure was conducted pursuant to a warrant, the defendant has the burden to prove the warrant

---

24. See Wong Sun v. United States, 371 U.S. 471 (1963), in which the question was stated as "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488 (quoting from JAMES MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

Several exceptions to the exclusionary rule exist, including the doctrines of attenuated fruits, the good faith exception, and purged taint. *See generally* LAFAVE, *supra* note 5, §§ 1.3, 11.4.

25. Though not considered here, a party who claims that his Fourth Amendment rights were violated must also have standing to bring such a claim. *See* Jones v. United States, 362 U.S. 257 (1960). For the purposes of this discussion, whether a defendant who seeks to suppress evidence which he possessed either on his person or in his effects has standing to raise Fourth Amendment issues is assumed. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980) (standing exists when defendant has a reasonable expectation of privacy in the intruded area and such is invaded); Rakas v. Illinois, 439 U.S. 128 (1978). *See generally* LAFAVE, *supra* note 5, § 11.3.

26. FED. R. CRIM. P. 1.

27. FED. R. CRIM. P. 41(f). A Motion for Return of Property, FED. R. CRIM. P. 41(e), works similarly to a motion to suppress, to petition the court to prevent evidence from being admitted at trial. The difference between the two motions is that the former applies to all evidence, even contraband, while the latter only applies to evidence which the person "is entitled to lawful possession of." *Id.*

28. FED. R. CRIM. P. 12(b)(3). The motion is required before trial to eliminate issues of police conduct, not related to the guilt or innocence of the defendant, from the main trial. FED. R. CRIM. P. 12 advisory committee's notes to 1974 Amendment.

29. *See generally* LAFAVE, *supra* note 5, § 11.1. The exception to this rule arises when matters appear during trial which indicate that an unconstitutional seizure occurred and that the pre-trial ruling may have been erroneous. *See* Gouled v. United States, 255 U.S. 298 (1921). The language in *Gouled* has been interpreted to impose a duty on the trial court judge to reconsider the ruling on suppression motion if "matters appearing at trial may cast reasonable doubt on the pretrial ruling." Rouse v. United States, 359 F.2d 1014, 1016 (D.C. Cir. 1966) (footnote omitted). *See also* United States v. Raddatz, 447 U.S. 667, 678 n.6 (1980).

or the execution of the warrant was defective.[30] If the police act without a warrant, the government has the burden to prove the search comported with the Fourth Amendment.[31] To determine if the evidence should be suppressed, the parties call witnesses, submit evidence, and engage in oral argument before the court.[32] In the federal courts, the judge may hear the motion or refer such to a federal magistrate.[33]

The defendant may not appeal an adverse ruling on the motion to suppress until a final judgement is rendered on the charges.[34] If convicted, the defendant may assert on appeal that the trial court erred in denying the motion to suppress and incorrectly admitted the challenged evidence. If the appeals court finds that the trial court did err, and that this error was not harmless and affected the verdict, the conviction may be reversed.[35] The prosecution, pursuant to statutory authorization,[36] may

---

30. Franks v. Delaware, 438 U.S. 154, 171 (1978) ("There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant."). *See generally* Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975).

31. United States v. Matlock, 415 U.S. 164 (1974); *See generally* LAFAVE, *supra* note 5, § 10.3; Saltzburg, *supra* note 30.

32. The Federal Rules of Evidence control the presentation of evidence at a suppression hearing. These rules are not necessarily as precisely or inflexibly applied during this hearing as during a trial to prove guilt. *Matlock*, 415 U.S. at 173-74.

33. Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A) (1988). The system of review established for judicial oversight of the magistrate's determination is relevant to the standard of review issue. This Act requires that the magistrate's findings be reviewed de novo by the district judge upon a party's objection to those findings. 28 U.S.C. §636(b)(1) (1988). Thus, a magistrate's determination of the seizure question receives a de novo review by the federal judge.

34. DiBella v. United States, 369 U.S. 121 (1962). The Court found that the motion to suppress was not severable from the primary criminal trial and was not interlocutory in nature. *Id.* Allowing interlocutory appeal of such an order, stated the court, would "entail serious disruption to the conduct of a criminal trial." *Id.* at 129 (footnote omitted). This rule rests upon the broader doctrine of collateral orders. *See generally* 3 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 678 (1982).

35. FED. R. CRIM. P. 52(a), which states that "[A]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Even if the error is not harmless, the appeals court is not required to reverse the verdict. If the error concerns the admission of evidence, the court must decide if that evidence had a sufficient bearing upon the total evidentiary picture to require reversal. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.6 (1985).

36. 18 U.S.C. § 3731 (1988). This statute states, in relevant portion:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence . . . not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

Id.

immediately appeal an order granting the suppression motion and excluding evidence.[37]

In a criminal proceeding, at least one basis of appeal usually concerns an evidentiary issue. Often the error is based on the trial court's denial of a motion to suppress. If the inadmissability of the evidence is predicated on a search incident to an illegal seizure, the appeals court must review the trial court's findings of whether the defendant was "seized" within the meaning of the Fourth Amendment. To begin the analysis, the appeals court must first decide what standard of review should be applied to determine if the trial court's finding that the defendant was "seized" is correct.

II. Current Standards of Review

The United States courts of appeal are divided on the appropriate standard of review to apply when reviewing a trial court's determination that a defendant was "seized." Two circuits review the determination de novo; other circuits defer to the trial court finding and only reverse if the decision is clearly erroneous.[38]

A. "De Novo" Review

A de novo review[39] of the trial court's seizure finding is applied by at least two appeals courts.[40] Use of this standard is usually supported by reference to the constitutional issues which a trial court is required to address. Accordingly, the Court of Appeals for the District of Columbia Circuit held that:

> [T]he soundest of jurisprudential considerations compel appellate courts not to shirk their responsibility independently to apply

---

37. If an interlocutory appeal of an adverse suppression order was not available to the prosecution, they would be required, as is the defendant, to wait until an adverse judgment, i.e. an acquittal, was delivered before appealing the suppression decision. The Fifth Amendment prohibits placing a defendant in double jeopardy and prevents the government from appealing an acquittal. United States v. Scott, 437 U.S. 82 (1978). Therefore, without an interlocutory appeal, the government would be unable to ever seek review of an adverse decision on a suppression motion. *See generally* LaFave, *supra* note 5, § 11.7(b).

38. Three courts of appeals have not unequivocally spoken as to the proper standard. These include the United States court of appeals for the Third, Tenth, and Eleventh Circuits.

39. A de novo review requires no deference to the lower court and allows a wholly independent and complete finding by an appeals court. *See* Jack H. Friedenthal et al., Civil Procedure § 13.4 at 600-01 (1985).

40. *See* United States v. Montilla, 928 F.2d 583 (2d Cir. 1991); United States v. Maragh, 894 F.2d 415 (D.C. Cir. 1990).

> important constitutional standards. In the Fourth Amendment context, as in the First Amendment setting, appellate judges have 'a constitutional responsibility that cannot be delegated to the trier of fact.'. . . *De Novo* review helps to ensure 'consistent application.'[41]

This rationale assumes that the seizure issue is a question of law which is traditionally afforded no deference upon appeal.[42] However, it seems that the D.C. Circuit extends this argument in finding that the seizure question is not only a question of law, but a question of constitutional law, making a de novo review even more important.[43]

Although the injection of the constitutional issue affects the discussion, the de novo standard could stand as easily upon the premise that the seizure issue is simply a question of law. Under traditional jurisprudence, a de novo review is conducted whenever a question of law, constitutional or otherwise, is reviewed on appeal.[44] The Second Circuit avoids the constitutional issue while still finding that the seizure question is one of law.[45] After reviewing *Mendenhall's* "reasonable person" standard for determining whether a defendant is seized, the court stated that, "[s]uch an objective inquiry pointedly eschews consideration of intent and involves an essentially legal assessment of whether the particular circumstances would warrant the belief that a person has been detained."[46] With only an "essentially legal assessment" to conduct, the Second Circuit finds no factual determinations by the district court which require deference. Thus, a de novo review is completely appropriate.

B. "Clearly Erroneous"

Seven courts of appeals[47] reverse the trial court's decision that a defendant was or was not "seized" only if that decision was clearly

---

41. *Maragh*, 894 F.2d at 418 (quoting Bose Corp. v. Consumers Union, Inc., 466 U.S. 485, 501 (1984)).

42. *Id.* As in the circuits that follow the clearly erroneous standard, the dissent in *Maragh* argued that the seizure question is one of fact and should be afforded deference on appeal. *Id.* at 420-21 (Mikva, J., dissenting).

43. *Id.* at 418.

44. *See infra* text accompanying note 99.

45. United States v. Montilla, 928 F.2d 583, 587-88 (2d Cir. 1991).

46. *Id.* The court continued by observing that "the Supreme Court's own practice suggests strongly that it views the seizure issue as a legal question." *Id.* at 588. Compare with this statement the conclusion of the Eighth Circuit, after extensive analysis of Supreme Court opinions, that the Court has not stated or applied a consistent standard of review. United States v. McKines, 933 F.2d 1412, 1419-20 (8th Cir. 1991).

47. *See* United States v. McKines, 933 F.2d 1412 (8th Cir. 1991); United States v. Valdiosera-Godinez, 932 F.2d 1093 (5th Cir. 1991); United States v. Rodriguez-Morales, 929 F.2d 780 (1st Cir. 1991); United States v. Gordon, 895 F.2d 932 (4th Cir. 1990); United States v. Collis, 699 F.2d 832 (6th Cir. 1983); United States v. Black, 675 F.2d 129 (7th Cir. 1982); United States v. Patino, 649 F.2d 724 (9th Cir. 1981).

erroneous.[48] The use of this standard is traditionally supported by the rationale expressed by the Ninth Circuit:

> The determination of when [a contact between a citizen and the police] constitutes a seizure within the meaning of the fourth amendment depends upon the facts and circumstances of each case. Proper deference must be given to the district judge who heard the testimony of the officer, his tone of voice and inflection, and who observed the officers conduct on the stand, his appearance and mannerisms. The district judge also observed the defendant in the courtroom. He is in the best position to evaluate the impression the defendant had when approached by the officers . . . . We cannot say that the finding of the district judge . . . was clearly erroneous.[49]

This can be restated as a simple syllogism: Major premise—whether a person was seized is a question of fact; minor premise—a trial court's factual determinations are deferred to on appeal; conclusion—the trial court's seizure determination should be deferred to on appeal. This logic, however, begs the question of the soundness of the major premise of whether the seizure issue is truly a factual determination.[50]

C. Supreme Court Hints

Two observations are apparent following a close analysis of the decisions of the courts of appeals. First, the Supreme Court has not unequivocally indicated which standard of review should be applied.[51] Second, advocates of each standard believe that the Supreme Court has

---

48. A trial court's finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). For a detailed analysis of this standard of review, see text accompanying note 93 *infra*.

49. *Patino*, 649 F.2d at 728. *See also McKines*, 933 F.2d at 1419-21, in which, after a thoughtful and thorough discussion of the policies and precedent underlying the issue, the Eighth Circuit held that the seizure issue was a question of fact and was reviewed for clear error on appeal.

50. Dissenting opinions in appeals courts which adopted this deferential standard often argue this exact point. *See, e.g., Black*, 675 F.2d at 138-39 (Swygert, J., dissenting) ("The factual findings . . . are not in dispute. The only issue is whether these facts constitute a Fourth Amendment seizure. This is a question of law and the standard of review, therefore, is not clearly erroneous.").

51. *See McKines*, 933 F.2d at 1419 ("This sort of inquiry is simply not fruitful, for it does not appear that the Supreme Court has decided the question."); *Montilla*, F.2d at 588 ("Although the Supreme Court has not spoken unequivocally on this subject. . . .").

adopted or would adopt their position and can find language supporting their view in Supreme Court decisions.[52] These two observations provide little help in determining the appropriate standard of review. In fact, they serve only to return us to our starting point, to analyze the competing standards in light of policy considerations and precedent and to make an independent determination based on merit.

However, an analysis of the Supreme Court opinions which have reviewed lower court determinations that a seizure did or did not occur is instructive. The values which the Court articulates in each review, explicitly or implicitly, assist in establishing an analytical framework to evaluate the standard of review. After *Terry v. Ohio*, the Court reviewed several lower court seizure determinations. In each decision, the Court seemingly deferred to the trial court's finding.[53] However, the *Terry* holding is not the primary test now used to determine whether a citizen was seized. Rather, the *Mendenhall* objective test is applied by the courts. Thus, *Mendenhall* and its progeny are more indicative of the current considerations regarding any standard of review.

Since the *Mendenhall* decision in 1980, the Supreme Court has reviewed at least five lower court seizure determinations.[54] In each case, the Court commented indirectly as to the scope of review applied. In *Mendenhall*, the plurality opinion stated that "the correctness of the legal characterization of the facts appearing in the record is a matter for this Court to determine."[55] This comment seems to suggest that the seizure standard is one of mixed law and fact and is to be reviewed de novo.[56] Similarly, after explaining the holding of the lower court on the "seizure" issue, the Court stated in *Florida v. Royer*[57] that "[t]he question before us is whether the record warrants that conclusion."[58] Several

---

52. *See McKines*, 933 F.2d at 1418.

53. *See, e.g.*, Brown v. Texas, 443 U.S. 47, 49 (1979) (where defendant was convicted for failing to identify self as required by state statute after being "lawfully stopped," court accepted without review that "the County Court necessarily found as a matter of fact that the officers 'lawfully stopped' appellant."). *See also* United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Sibron v. New York, 392 U.S. 40 (1968) (decided the same day as *Terry*).

54. *See* Florida v. Bostick, 111 S. Ct. 2382 (1991); California v. Hodari D., 111 S. Ct. 1547 (1991); Michigan v. Chesternut, 486 U.S. 567 (1988); INS v. Delgado, 466 U.S. 210 (1984); Florida v. Royer, 460 U.S. 491 (1983).

55. *Mendenhall*, 446 U.S. at 551 n.5. (Stewart, J., concurring). This opinion was joined only by Justice Rehnquist (now Chief Justice).

56. Justice White's dissent in *Mendenhall* chastises the plurality for even considering whether a seizure had occurred because such a determination is "a fact-bound question with a totality-of-circumstances assessment that is best left in the first instance to the trial court. . . ." *Mendenhall*, 446 U.S. at 569-70.

57. 460 U.S. 491 (1983).

58. *Id.* at 501. This ambiguous phrase could indicate a clearly erroneous standard

years later, in *Michigan v. Chesternut*,[59] the Court refused to adopt a bright-line test to indicate when a seizure occurs, deciding instead to "adhere to our traditional contextual approach, and determine only that, in this particular case, the police conduct in question did not amount to a seizure."[60] This statement suggests that the issue is a factual one, traditionally receiving a deferential standard of review. The Court continued the post-*Terry* trend of expounding their ability to review de novo the findings of a lower court. In each case, the Court does not explicitly indicate that any degree of deference will be given to the trial court's findings. Instead, the Court implicitly indicates that a de novo review will occur.

Even more instructive than the Court's explicit statements regarding the scope of its review is the extent of the review in which it actually engaged. In each post-*Mendenhall* case, the Court carefully examined the facts contained in the record, ostensibly to draw its own, independent factual inferences to which to apply the *Mendenhall* test.[61] In *Michigan v. Chesternut*[62] the Court determined that no seizure occurred because: "The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt, or displayed any weapons; or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement."[63] The *Chesternut* language suggests that the presence of these facts would have persuaded the Court that a seizure had occurred.[64] In

---

of review especially given the deference inherent in a review of a trial record to determine if such "warrants" the trial court's decision.

59. 486 U.S. 567 (1988).

60. *Id.* at 573. After restating the *Mendenhall* "reasonable person" test, the Court held that "[after] [a]pplying the Court's test to the facts of this case, we conclude that respondent was not seized . . . ." *Id.* at 574. Conspicuously absent from the Court's discussion is any mention of the findings of the trial court or their impact upon the scope of review.

61. *See* Florida v. Royer, 460 U.S. at 501 (After carefully reviewing the facts of the defendant's contact with the law enforcement officers, the court found that "[t]hese circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'") (citations omitted). *See also* INS v. Delgado, 466 U.S. 210, 218-19 (1983).

62. 486 U.S. 567 (1988).

63. *Id.* at 575.

64. In this case, the Court reviewed a Michigan Court of Appeal's holding which applied a clearly erroneous standard of review to the trial court. Michigan v. Chesternut, 403 N.W.2d 74, 75 (Mich. Ct. App. 1986). If the Supreme Court was itself using such a standard, the detailed review of the facts would be unnecessary to justify their reversal of the state court. Rather than engage in supposing hypothetical facts which would indicate a seizure occurred, the Court, in deferring to the trial court, would simply review the record to determine whether the facts present in the record supported the trial court's

the two most recent decisions reviewing lower court seizure determinations, the Court continued to emphasize the controlling nature of its independent inferences from the facts. In *California v. Hodari D.*,[65] the Court reversed a state appeals court ruling which found that a seizure had occurred because of the absence of a single fact during the police encounter.[66] In *Florida v. Bostick*,[67] the Court refused to address the issue of whether the defendant was seized when insufficient facts existed for the Supreme Court to review the decision. Instead, the Court remanded the cases to the state court to determine the facts and to apply those facts to the standard which the Supreme Court devised.[68]

Combining the explicit statements of the Court with its close scrutiny of the record, it seems that the Supreme Court considers a seizure determination a question of fact, but reviews the trial court's factual findings de novo. If such a conclusion is accepted, an incongruity emerges which merits further investigation and explanation.[69] Regardless, the only consistent, clear, and articulated conclusion to be drawn from Supreme Court decisions is that the applicable standard of review has yet to be determined.

---

finding. If insufficient support existed, the Court could find the lower court's holding clearly erroneous and reverse. *See* United States v. U.S. Gypsum Co., 333 U.S. 364 (1948). Here, however, the Court analyzed in reverse and found the facts which would allow it to find a seizure occurred were absent, thus indicating a de novo review.

65. 111 S. Ct. 1547 (1991).

66. *Id.* at 1552. The single fact absent from the record was the defendant's submission to the police order: "In sum . . . since [the defendant] did not comply with that injunction he was not seized until he was tackled." *Id.* The court based this holding on the decision in Brower v. Inyo County, 489 U.S. 593 (1989), in which the Court found no seizure occurred during a vehicle chase because the defendant failed to stop. Thus, the singular fact of not succumbing to the order of the police was dispositive in both cases as to the seizure determination.

67. 111 S. Ct. 2382 (1991).

68. *Id.* at 1552. At least two inferences are possible from this action. First, because the Court had available the record of the proceedings below on which they relied for factual information concerning the police encounter, it would seem the Court could have reviewed the record de novo to draw its own inferences on which to base a seizure determination. The Court instead chose to remand the case. This action suggests that the Court does rely upon and defer to the trial court's factual findings. Second, and alternatively, the Supreme Court might have remanded the case to allow the state courts to apply the new legal standard, a standard different than the one on which the lower courts based their holding, to the factual situation presented in the case. Accordingly, it is very likely that the Court implies nothing from the remand except its own sense of judicial economy and fairness.

69. The incongruity is the de novo review of a trial court's factual determination. The traditional rule has always been, except for a limited number of exceptions, that an appeals court defers to a trial court's factual findings and reverses only if clear error is present. *See* Anderson v. Bessemer City, 470 U.S. 564 (1985).

III. The Law-Fact Distinction and Standards of Review

The division of labor in the federal judicial system is determined, in large part, by a conclusory labelling of issues as factual or legal in nature.[70] The applicable standard of review is a statement by an appellate court indicating which level of the judicial system is granted primary authority to resolve the issue.[71] The scope of decisionary power exercised by each level of the system over any given legal dispute is determined by this labelling practice.[72] Thus, the determination that the seizure issue is one of fact or law depends upon considerations of policy. These policy factors are often dispositive of the scope of review regardless of the factual or legal nature of the issue. However, limited exceptions to the fact/law labels have been created in the area of constitutional rights.

A. Law v. Fact

In general, American courts adhere to a well-defined pattern of jurisprudence.[73] First, the pertinent facts are determined; second, the law relevant to the dispute is established; and, last, the law is applied to the facts to result in a legal determination of the rights of the parties.[74] These steps in the process are not necessarily as independent of each other as first appears. For example, to determine which facts are relevant, the applicable law must be ascertained, while the applicable law depends on which facts are found to exist.[75] This process of circular reasoning demonstrates that the distinction between law and fact is not as clear as suggested.

The exact delineation of what portions of the legal process are "fact" and which portions are questions of "law" is often confusing.[76] A "fact," as used in the judicial process, has been defined in a number of ways.[77] Perhaps the clearest definition is that a fact tends to answer

---

70. *See* Robert L. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 Harv. L. Rev. 70, 93 (1944).

71. *Id.*

72. *Id.*

73. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 374 (tent. ed. 1958).

74. *Id.* at 374-75.

75. Hart & Sacks, *supra* note 73, at 375. "[T]his three-fold process is [not] a simple step-one, step-two, step-three process. . . . [T]he law determines what facts are relevant while at the same time the facts determine what law is relevant." *Id.*

76. *See generally* Stephen A. Weiner, *The Civil Non Jury Trial and the Law-Fact Distinction*, 55 Cal. L. Rev. 1020 (1967).

77. Facts have been defined as the "determination and statement of the relevant characteristics of the particular matter before the judge." Hart & Sacks, *supra* note 73, at 375. "A thing done; an action performed or an incident transpiring; an event or circumstance; an actual occurrence; an actual happening in time or space or an event mental or physical; that which has taken place." Black's Law Dictionary 591 (6th ed. 1990).

the questions of who did what, when, where, how, why, or with what intent.[78] Conversely, determinations of "law" have been defined as "fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one *sub judice*."[79] The final step in the adjudicative process, that of applying the law to the facts, results in a finding of "ultimate fact."[80] An ultimate fact, often labelled an issue of mixed fact and law,[81] is not merely a distinguishable category of fact, but rather a third category requiring a different analysis to discern the applicable standard of review.[82]

The Supreme Court has struggled to clearly establish the difference between law and fact on several occasions, but without much success.[83] The Court avoids establishing a bright-line definition. Instead, it dictates on a case-by-case basis which parts of a cause of action are fact and

---

78. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 235 (1985).

79. Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 n.3 (1986).

The Supreme Court has defined facts "in the sense of a recital of external events and the credibility of their narrators. . . ." Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963) (quoting Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.)).

In determining law, the judge is "formulating a proposition which affects not only the case before him but all others that fall within its terms." HART & SACKS, *supra* note 74, at 374-75. "Law is a principle . . . Law is conceived . . . Law is a rule of duty. . . ." BLACK'S LAW DICTIONARY 592 (6th Ed. 1990).

80. *See* Stern, *supra* note 70 at 93 (discussion of interaction of facts, law and ultimate facts). Yet another category of "fact" exists, that of "constitutional fact." These are facts crucial to determining whether a certain constitutional right is implicated. *See infra* text accompanying note 94.

81. A mixed question of law and fact is one in which:

> [T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated.

Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

82. FED. R. CIV. P. 52(a) "does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 286. *Cf.* Louis, *supra* note 79. Professor Louis believes that ultimate facts are not a separate category but rather are facts which are reviewed de novo or for clear error depending upon their tendency to be more like law or more like facts.

83. In Pullman-Standard v. Swint, 456 U.S. 273 (1982), the Supreme Court "noted the vexing nature of the distinction between questions of fact and questions of law." *Id.* at 288. *See also* Anderson v. Bessemer City, 470 U.S. 564 (1985); Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

which are law.[84] As yet, no distinction expounded by the Court serves as an absolute guide to lower courts in the struggle to divide facts from law.[85]

B. Standards of Review and Policy Considerations

On appeal, a party will allege that an error occurred in the lower court requiring an alteration of the lower court's judgment. The intensity and extent of review in which the appellate court may engage depends upon the nature of the alleged error.[86] Generally, an appellate court may reverse a trial court's factual findings only if those findings are clearly erroneous.[87] An error of law, however, allows the appellate court to substitute its judgement for the decision of the trial court via a de novo review.[88] If a mixed question of law and fact exists, a different analysis, requiring a balancing of policy considerations, is applied to determine the scope of review.[89] These well-established rules define the scope of appellate review based on whether the alleged trial court error was one of "fact" or "law."[90]

A crucial point must be made at this juncture. Identifying a trial court decision as one of fact, law, or both is not a mechanical process ultimately compelling a standard of review. Behind these distinctions lie a large body of policy considerations supporting each corresponding

---

84. *See, e.g., Pullman-Standard*, 456 U.S. at 287-88 (issue of intentional discrimination is a pure question of fact). The Supreme Court has framed the law-fact distinction as a matter of common sense, holding that the clearly erroneous standard should apply whenever the finding in question is based on the "fact-finding tribunal's experience with the mainsprings of human conduct . . . ." Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

85. As one appellate court judge warns: "'[l]aw' and 'fact' do not in legal discourse denote pre-existing things; they express policy-grounded legal conclusions." Weidner v. Thieret, 866 F.2d 958, 961 (7th Cir. 1989) (Posner, J.).

86. FRIEDENTHAL ET AL., *supra* note 39, § 13.4.

87. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961). *See generally* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585 (1971).

88. *Mississippi Valley Generating Co.*, 364 U.S. at 526. *See generally* WRIGHT & MILLER, *supra* note 87, § 2588.

89. Pierce v. Underwood, 487 U.S. 552, 559-60 (1988).

90. These rules are more than common law precepts of judicial procedure. It has been held that FED. R. CIV. P. 52(a) will be applied to the findings of a judge in criminal cases on issues other than the guilt of the defendant. Campbell v. United States, 373 U.S. 487 (1963). This rule states that "[f]indings of fact shall not be set aside unless clearly erroneous . . . ." FED. R. CIV. P. 52(a). Undoubtedly, this rule has established a principle which affects all aspects of the appellate process. *See generally* WRIGHT & MILLER, *supra* note 87, § 2573.

review standard.[91] These considerations are the forces that propel the labelling of an issue as fact or law and which results in the application of a standard of review.[92]

1. Pure Facts and Reviewing for Clear Error.—Requiring the presence of clear error before reversing a trial court finding severely limits the scope of appellate review.[93] This limit is justifiedly applied to factual findings for several reasons.[94] The most persuasive rationale for applying this limited review is the special expertise which the trial court has in judging the credibility of the witnesses, analyzing the demeanor of the parties, and weighing the evidence.[95] A second reason for this deference is a consideration of judicial economy and the proper role of the trial courts vis-a-vis appeals courts.

Federal courts are faced with an ever increasing work load, causing the efficiency of the system to become an important concern. This concern is often manifested in judicial policy determinations allocating labor between the trial and appellate courts.[96] Thus, appellate courts are more willing to grant trial courts greater discretion in judicial decisions regarding facts. This results in a limited appellate review of trial court

---

91. As stated by the Supreme Court, determinations of standards of review "reflect an accommodation of the respective institutional advantages of trial and appellate courts." Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991).

92. At least one court of appeals agrees fully with this statement. In United States v. McConney, 728 F.2d 1195 (9th Cir. 1984), the United States Court of Appeals for the Ninth Circuit, sitting *en banc*, stated:

> The appropriate standard of review for a district judge's application of law to fact may be determined . . . by reference to the sound principles which underlie the settled rules of appellate review. . . . If the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the district judge's finding to de novo review. *Thus, in each case, the pivotal question is do the concerns of judicial administration favor the district court or do they favor the appellate court.*

Id. at 1202 (emphasis added).

93. As stated by the Supreme Court, "review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception." Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

94. *See generally* Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

95. *See* Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844 (1982); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969). *See generally* WRIGHT & MILLER, *supra* note 87, § 2586.

96. *See* Louis, *supra* note 79.

determinations.[97] One method of achieving this limit is to classify a trial court finding as one of fact and to apply the clearly erroneous standard of review.[98]

2. Pure Law and Reviewing De Novo.—Determinations of law are reviewed de novo on appeal.[99] The legal conclusions of the trial court receive no deference from an appeals court conducting a de novo review.[100] This broad reassessment of the lower court decision results from the stated role of an appeals court to determine the law.[101] Unlike questions of fact, the appeals court is in as good of position as the trial court to determine the applicable law.[102] Further, de novo review of legal questions promotes consistency and predictability in application of correct legal principles to similar factual conditions.[103] In this respect, the appeals courts exert supervisory power over the application of law by the lower courts.

3. Mixed Questions of Law and Fact.—Unlike questions of pure fact or law, the presence of a mixed question of law and fact does not automatically and consistently dictate a standard of review on appeal. In fact, the Supreme Court has determined that mixed questions require an extensive analysis to determine the applicable standard:

> We recently observed, with regard to the problem of determining whether mixed questions of law and fact are to be treated as

---

97. This concern for efficiency is evident in recent opinions. In Anderson v. Bessemer City, 470 U.S. 564 (1985), the Supreme Court reversed an appeals court decision to review de novo a factual finding of the trial court which did not involve a credibility determination. Finding that the appeals court misinterpreted FED. R. CIV. P. 52(a), and should have reviewed for clear error, the Court stated: "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact determination at a huge cost in diversion of judicial resources." 470 U.S. at 574.

98. However, even if a finding is classified as fact, there are exceptions to the clearly erroneous review requirement. The doctrine of constitutional fact is one example. *See infra* text accompanying notes 137-38.

99. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961).

100. *Id.* at 524.

101. Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 510-11 (1983).

102. This equality of review of questions of law should be contrasted with review of factual determinations, where the Supreme Court has found:

> It seems entirely reasonable to expect, therefore, that appellate judges will continue to defer to the judgment of trial judges who are "on the scene". . . and that they will not inexorably reach the same conclusion on a cold record at the appellate stage that they might if any one of them had been sitting as a trial judge.

Oregon v. Kennedy, 456 U.S. 667, 676 n.7 (1982) (quoting Gori v. United States, 367 U.S. 364, 368 (1961)).

103. *See* FRIEDENTHAL ET AL., *supra* note 39, § 13.4 at 601.

> questions of law or of fact for purposes of appellate review, that sometimes the decision "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[104]

When confronted with a mixed question of law and fact, an appeals court should defer to the trial court's findings "when it appears that the district court is better positioned than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[105] Once a given issue is identified as a mixed question of law and fact, the appellate court must evaluate the policy concerns which underlie the different standards of review; the standard which best serves the underlying policy consideration is applied. This is the analysis required to determine the proper standard to review a seizure finding.

C. Application to "Seizure" Determinations

The law-fact distinction assists in determining which standard to apply when reviewing a trial court's finding that a criminal defendant was "seized" during an encounter with law enforcement officers. A two-step analysis determines if the law-fact distinction applies to dictate the standard of review for a particular issue. First, it must be decided into which category, law, fact, or mixed law and fact, a trial court's "seizure" determination falls. Second, the underlying policies which support the standard of review applied to the particular category are analyzed to see if they are appropriate and applicable to the seizure issue.

Although this discussion may imply that the factors are, or should be, considered in this order, no such implication is intended. Rather, as the discussion above fairly indicates, identifying an issue as one of fact or law is a result-oriented process. In fact, the category of mixed fact and law is most likely a result of judicial unhappiness with any categorization process that requires the application of rigid standards of review. Accordingly, the middle category honestly depicts the actual reasoning and analysis used to determine the standard of review: a weighing of competing policy considerations.

1. Characteristics of a Seizure Determination.—The *Mendenhall* test is applied by a court to determine whether a person was seized for purposes of the Fourth Amendment.[106] The test is objective and requires

---

104. Pierce v. Underwood, 487 U.S. 552, 559-60 (1985) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

105. Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991).

106. See *supra* text accompanying note 16.

a court to determine if a reasonable person, in similar circumstances as the defendant, would have felt free to leave the presence of the law enforcement officers.[107] The analysis involved in applying this test, as well as the similarity of the *Mendenhall* standard to other objective tests employed by courts, assists to determine whether the seizure finding is one of fact, law, or mixed law and fact.

A three-step analysis is applied to determine if a seizure occurred. The initial step is to establish the legal principle which guides the analysis. This is the traditional pure determination of law. Little doubt exists that an appeals court would review de novo a trial court's attempt to alter the seizure test or to apply a standard inconsistent with the *Mendenhall* test. Second, the circumstances which existed during the defendant's encounter with the police are ascertained. These findings of who, what, when, where, and why are the typical findings of fact by the trial court. These findings, being devoid of any legal principle, are reviewed under the clearly erroneous standard. Finally, these facts, after being entered into the *Mendenhall* equation, are evaluated to determine whether a reasonable person would have felt free to leave under the circumstances confronting the defendant. This application of the law to the facts is a finding of ultimate fact, or mixed law and fact. The key to establishing the applicable standard of review is to determine which of these steps is crucial to a seizure finding. The character of that step indicates the characterization of the seizure finding as one of law, fact, or a mixed question of law and fact.

During a motion to suppress evidence, the trial court will usually conduct a hearing where witnesses testify, evidence is introduced, and affidavits are presented.[108] The court evaluates this evidence and finds the facts existing at the time of the encounter. However, no seizure finding occurs until the trial court applies the *Mendenhall* test to these facts. If the trial court finds the facts satisfy the test, a seizure occurred. But for the application of the law to the facts, no seizure occurred. Thus, this critical step in the seizure determination is the application of the law to the facts. This conclusion is supported by the concurring

---

107. United States v. Mendenhall, 446 U.S. 554, 554 (1980). A more recent case reinforces the objective nature of the seizure test: "Mendenhall establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." California v. Hodari D., 111 S. Ct. 1547, 1551 (1991).

108. When reviewing a trial court's suppression decision, an appeals court will usually consider not only the testimony received during the pre-trial motion, but will also consider relevant testimony and evidence which arose at trial. Carroll v. United States, 267 U.S. 132, 162 (1925).

opinion of Justice Powell in *INS v. Delgado*,[109] in which he stated that determining whether a defendant was seized "turns on a difficult characterization of fact and law. . . ."[110]

The characterization of this critical step of the *Mendenhall* test determines the overall nature and characterization of the seizure finding. The application of law to fact is considered a mixed question of law and fact. Accordingly, under this analysis, the seizure determination is one of mixed law and fact and subscribes to neither of the established principles of review for pure fact or pure law. Instead, the correct standard of review depends upon a balancing of the underlying policy considerations of each standard vis-a-vis the seizure issue.

2. Policy Considerations and the Seizure Determination .—The policies supporting the application of both a clearly erroneous and de novo standard of review are present in a seizure determination.[111] However, the issue is whether the policy considerations supporting one standard outweigh those supporting the application of the alternative standard.[112] Essentially, the question resolves into one of fairness, efficiency, and judicial economy.

The Supreme Court and lower courts continually characterize the seizure determination as fact intensive.[113] In *INS v. Delgado*, the Court restated the *Mendenhall* test: "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[114] Thus, the duty of the trial court is to determine the facts by closely analyzing the citizen-police encounter and the surrounding circumstances. The objective test is then applied to these facts. This analysis is normally conducted in a pre-trial hearing on a motion to suppress.[115] The assessment of witness credibility is a task peculiarly suited for a trial court judge, who is able to observe the demeanor, reactions, and conduct of the witness.[116] The appellate court, able only to review the trial court proceedings from a written record,

---

109. 466 U.S. 210, 221 (1984).

110. *Id.* at 221.

111. If both sets of policy considerations were not present, it is doubtful that a dispute would exist among the circuits over which standard to apply.

112. This is essentially the balancing test indicated by Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991).

113. "Given that the one consistent, dominant theme in each of the Supreme Court's cases applying the *Mendenhall* test is the Court's emphasis on the fact-intensive nature of the inquiry. . . ." United States v. McKines, 933 F.2d 1412, 1420 (8th Cir. 1991).

114. 466 U.S. at 215.

115. *See supra* text accompanying note 25.

116. *See* Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

is deprived of this advantage in assessing credibility.[117] Because of this handicap, a large amount of judicial time and resources is wasted when an appeals court attempts to review credibility and fact issues de novo. Further, the process of assessing facts from a cold written record is unfair to the litigants. Accordingly, judicial economy and fairness require the deferential principles underlying a clearly erroneous standard of review.[118]

Two arguments generally support the application of a de novo review, one based on fairness and the other based on judicial efficiency.[119] First is the necessity of an accurate and consistent application of the *Mendenhall* test to ensure fairness to litigants. This goal is only achieved with broad appellate court scrutiny.[120] The second argument, judicial efficiency, turns on the notion that appellate courts cannot "shirk their responsibility independently to apply important constitutional standards."[121] Because an important function of an appeals court is to determine what the law is, and because a seizure finding is inherently fact-sensitive, it is presumed that those courts are better and more efficient in applying Fourth Amendment law to relevant factual situations.[122] Further, the appeals court traditionally supervises application of correct legal principles by trial courts. These arguments indicate a broad review of the trial court seizure finding is warranted. The principles which support de novo review protect the application of a vital legal principle to factual findings.

The principles which support de novo review and those that support a clearly erroneous review are both indicated by the seizure issue. However, the salient issue to determine is which principles are most relevant to the seizure issue. The persuasiveness of these principles is weighed against the opposing values to determine which standard of review to apply.

---

117. *Id.* at 574-75.

118. *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990), in which the Court, in discussing sanctions under FED. R. CIV. P. 11 stated: "Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependant legal standard. . . ." 110 S. Ct. at 2459.

119. *See generally* United States v. McKines, 933 F.2d at 1422. Although stating only one reason exists supporting de novo review, the discussion in which the court engages is logically more clear if considered as two separate policy grounds.

120. Limited appellate review could allow moderate deviations in the application of the *Mendenhall* test to particular facts. These deviations, if not extreme, may not rise to the level of clear error and allow appellate court reversal.

121. United States v. Maragh, 894 F.2d 415, 418 (D.C. Cir. 1990) (analysis of the District of Columbia Circuit upon adopting a de novo review of a trial court's seizure determination).

122. This principle, especially as applied to constitutional rights, is discussed separately and more fully *infra* at text accompanying note 132.

3. Other Objective Tests and Relevant Characteristics.—Another analytical tool which assists in determining the standard of review to apply to a seizure finding is analogous objective tests developed to scrutinize the action and interaction of persons in our society. The standards of review applied to these other objective tests are instructive in determining the proper review of the objective seizure test.

The most prevalent objective test employed by the judicial system is that used to determine negligence.[123] This test requires a court to determine if a person alleged to be negligent acted as a reasonable person would under similar circumstances.[124] As in a seizure determination, a finding of negligence is a mixed question of law and fact.[125] The legal question is whether a duty exists, and if so, what the content of that duty is; the factual issue is whether the defendant breached that duty.[126] When the facts are applied to this legal duty, a mixed question of law and fact is answered. A finding of negligence is subject to deferential review for clear error.[127]

Even more closely related to the seizure determination is the question of when property is considered abandoned for purposes of the Fourth Amendment.[128] If property is abandoned, all privacy interests in the property are lost and the Fourth Amendment does not apply to a search or seizure thereof.[129] To determine if the property was abandoned, the trial court must ascertain the intent of the person who abandoned the property by examining the objective manifestations of that intent.[130] A

---

123. The objective nature of the negligence test and its relevance to the standard of review applicable to a seizure determination was discussed by the Eighth Circuit in United States v. McKines, 933 F.2d at 1421.

124. *See* RESTATEMENT (SECOND) OF TORTS § 291 (1965):

> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

Id.

125. *See* McAllister v. United States, 348 U.S. 19 (1954).

126. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 35 (5th ed. 1984).

127. *McAllister*, 348 U.S. at 20.

128. The objective nature of the abandonment test was discussed by Judge Mikva in dissenting from the District of Columbia Circuit's decision to adopt a de novo standard of review for the seizure issue. United States v. Maragh, 894 F.2d 415, 423 (D.C. Cir. 1990) (Mikva, J., dissenting).

129. *See* Abel v. United States, 362 U.S. 217 (1960). *See also* Katz v. United States, 389 U.S. 347 (1967) (scope of Fourth Amendment protection extends only where legitimate expectation of privacy by individual exists).

130. *Abel*, 362 U.S. at 240-41.

trial court's finding on the abandoned property issue is reviewed for clear error by the appeals court.[131]

Other objective tests applied by trial courts, in both criminal and civil areas, are reviewed deferentially on appeal.[132] These analogies are illustrative, but not dispositive. These questions of mixed law and fact are afforded certain standards of review based upon an analysis of the competing policy considerations. The fact that they are objective tests does not logically require the conclusion that all objective tests be reviewed deferentially. Rather, policy considerations must be analyzed and applied to the specific legal issue to determine whether the "district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine."[133] Regardless, the standards applied to these legal issues by courts are illustrative of the underlying values the courts find present in objective rules and assist in analyzing the standard applicable to the *Mendenhall* rule.

IV. Constitutional Fact

A. Doctrine

In *Bose Corp. v. Consumers Union of United States, Inc.*,[134] the Supreme Court defined and applied the doctrine of constitutional fact as related to First Amendment rights. In *Bose Corp.*, the Court found that a determination of "actual malice" in a defamation action was indeed a question of fact but that an appellate court nonetheless had a duty to review the trial court's determination de novo.[135] Because such a finding of fact depends upon a sound construction of constitutional

---

131. United States v. Kendall, 655 F.2d 199, 203 (9th Cir. 1981), *cert. denied sub nom.*, Akers v. United States, 455 U.S. 941 (1982).

132. Another area in which the courts have adopted an objective test is the determination of whether a criminal defendant's confession was voluntary or the product of coercion under the Due Process Clause of the Fifth or Fourteenth Amendment. *See* Culombe v. Connecticut, 367 U.S. 568 (1961). However, most appellate courts review the trial court's determination on this issue de novo. *See* Green v. Scully, 850 F.2d 894, 901 (2d Cir. 1988); Miller v. Fenton 796 F.2d 598, 601 (3d Cir. 1986). For a criticism of standards that advocate a clearly erroneous review for the voluntariness of confessions, *see generally* Note, *Voluntariness of Confessions in Habeas Corpus Proceedings: The Proper Standard for Appellate Review*, 57 U. Chi. L. Rev. 141 (1990).

133. Salve Regina College v. Russell, 111 S. Ct. 1217, 1222 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)).

134. 466 U.S. 485 (1984).

135. *Id.* at 510-11 ("The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact.").

principles, no deference is given to the trial court's factual determinations.[136] If this doctrine extends beyond the First Amendment and affects the application of other Bill of Rights guarantees, the standard of review for a Fourth Amendment seizure determination may also be altered.

1. Constitutional Duty.—The Supreme Court has indicated that appeals courts have a constitutional duty to review de novo a lower court factual determination if that fact is appropriately a "constitutional fact".[137] In *Bose Corp.*, the Court stated:

> The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.[138]

Once a factual determination is found to invoke the constitutional fact doctrine, an appellate court loses discretion to defer to the trial court. However, this duty only attaches if a constitutional fact is being adjudicated. Thus, the initial query is whether the relevant fact determinations are of a constitutional nature sufficient to invoke application of the doctrine.

---

136. *Id.* at 509-10. *See also* Time, Inc. v. Pape, 401 U.S. 279 (1971). In *Time*, the Court stated that constitutional inquiries "are familiar under the settled principle that '[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.'" *Id.* at 284 (quoting Niemotko v. Maryland, 340 U.S. 268, 271 (1951)).

137. *Bose Corp.*, 466 U.S. at 501. In Roth v. United States, 354 U.S. 476 (1957), the Court discussed a lower court finding that a particular matter was obscene. Justice Harlan, for the majority, stated:

> Since [obscenity] standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which appellate courts must make for themselves. *I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts . . . has labeled the questioned matter as 'obscene,'* for . . . the question . . . involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind."

Id. at 497-98 (first emphasis added).

See also Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C. L. Rev. 311, 323-24 (1969) (supporting the existence of a constitutional duty to review de novo constitutional facts). *But see* Monaghan, *supra* note 78, at 264-71 (stating that the question of which standard of review to apply to a constitutional fact issue is a matter of judicial discretion).

138. *Bose Corp.*, 466 U.S. at 510-11.

2. Constitutional Fact Defined.—The Supreme Court has not articulated an extremely clear definition of a constitutional fact. Instead, the Court reviews de novo the factual findings in "cases in which there is a claim of denial of rights under the Federal Constitution."[139] Under this analysis, the nature of the substantive law or principle in question, not the facts, determines whether the doctrine applies.[140] In *Bose Corp.*, the Court was again confronted with defining a test to determine when an appellate court must engage in de novo review of lower court factual findings. The Court discussed the application of the doctrine to First Amendment issues and found "[w]hen the standard governing the decision of a particular case is provided by the Constitution, this Court's role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance."[141] Broadly read, this holding requires de novo review of any action based upon an interpretation of a constitutional principle.

Thus, a constitutional fact is any fact which is a predicate finding to the application of a constitutional principle. Under the rule of *Bose Corp.* a trial court's role as fact-finder is jeopardized because of the multiple constitutional issues to which the doctrine would apply. This broad application is not, however, evident in the Court's review of every constitutional right. Instead, the Court has been selective in applying the doctrine to only particular constitutional principles.

3. Scope of Application.—The *Bose Corp.* holding concerned First Amendment rights. However, the Court has applied a de novo review to trial court ultimate factual determinations when other constitutional rights are in issue.[142] Among the rights afforded broad review are the

---

139. *Id.* at 509 (quoting Time, Inc. v. Pape, 401 U.S. 279, 284 (1971)).

140. The substantive law underlying a case often determines whether a particular finding is one of fact or one of law. *See Bose Corp.*, 466 U.S. at 501 n.17 (indicating that at some point a particular finding becomes one of law rather than fact and "[w]here that line is drawn varies according to the nature of the substantive law at issue."). It seems quite logical that whether a factual determination requires application of the constitutional fact doctrine depends upon a similar characture of the underlying legal principles.

141. *Bose Corp.*, 466 U.S. at 503.

142. In Baumgartner v. United States, 322 U.S. 665 (1944), the Court gave a broad indication of the type of constitutional issue which may merit a non-deferential review of the facts:

> Thus, the conclusion that may appropriately be drawn from the whole mass of evidence is not always the ascertainment of the kind of 'fact' that precludes consideration by this Court. Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.

Id. at 671.

voluntariness of a confession under the Fifth Amendment[143] and equal protection clause claims.[144] Thus, a trial court's determination of a varied group of constitutional rights receives no deference on appellate review. Though many rights require de novo appellate review, not every principle of the Constitution requires such exhaustive appellate scrutiny. Instead, the courts selectively determine which rights require the close appellate supervision afforded by the constitutional fact doctrine.[145] Factual findings related to constitutional rights which do not require de novo review include a magistrate's finding that probable cause to issue a search warrant exists,[146] the decision that an object is obscene,[147] and, in some instances, interpretations of the Fourteenth Amendment's Equal Protection Clause.[148] These examples indicate that courts classify constitutional rights as constitutional facts sometimes, but not others.[149] Thus, before this doctrine can be applied to a Fourth Amendment seizure determination, a rule of analysis must be distilled that determines when an appellate court may undertake a full review of the trial court's actions.

4. Policy Basis.—Crucial to applying the constitutional fact doctrine is an understanding of the policies supporting its use. Although the doctrine is greatly criticized,[150] certain judicial policies are favorably

---

143. *See* Payne v. Arkansas, 356 U.S. 560, 562 (1958) ("[W]here the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious.").

144. *See* Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954) (These cases "opened up vast areas of substantive constitutional fact litigation."). Louis, *supra* note 79, at 1031 n.287. *But see* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979) (clearly erroneous review applied to equal protection challenge of public school segregation).

145. Although not necessarily a constitutional right, the Supreme Court has determined that causes of action which challenge activity under the commerce clause, U.S. CONST. art. I, § 8, receive a limited review for clear error. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983).

146. *See* Illinois v. Gates, 462 U.S. 213 (1983) (reviewing court must uphold magistrate's probable cause determination if "substantial basis" exists for that conclusion).

147. *See* Miller v. California, 413 U.S. 15, 24-25 (1973) (the determination that an object is obscene is reviewed deferentially on appeal).

148. *See* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534-37 (1979) (application of equal protection clause to challenge segregation of public schools reviewed for clear error).

149. It is also apparent that a rational rule indicating when the constitutional fact doctrine applies to a particular right has yet to be announced. *See* Monaghan, *supra* note 78, at 264-71.

150. *See, e.g.,* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 520 (1984) (Rehnquist, J., dissenting) ("I cannot join the majority's sanctioning of factual second-guessing by appellate courts."). *See generally* Monaghan, *supra* note 78, at 264-76.

served by its application. Among those policies served are the consistent application of constitutional law,[151] the protection of vital constitutional values,[152] and the special duty of the appellate courts to supervise a trial court's application of constitutional principles to the facts.[153] The factors weighing against the application of the constitutional fact doctrine are also numerous and persuasive. These include the necessity of maintaining a proper balance of judicial power between the trial and appellate courts, overburdening the appellate courts by requiring frequent de novo reviews, and the trial court's expertise in making findings of facts. If these values are collected, applied, and measured against the particular constitutional right at issue, a framework for analyzing and determining whether to apply the doctrine emerges.

5. When Applied.—A leading scholar argues that the constitutional fact doctrine should apply, and a de novo review be conducted, in two situations.[154] First, a trial court's factual findings should not receive deference if possible judicial systemic bias threatens the litigant.[155] Second, an appeals court may review a trial court's factual findings de novo if there exists a "perceived need for case-by-case development of constitutional norms."[156] The second application of the doctrine is supported by the Supreme Court's opinion in *Bose Corp.*[157] Professor Monaghan's test simplifies the otherwise complex doctrine of constitutional fact. However, such simplicity disregards the multiple policy factors which should be considered whenever the balance of power between trial courts and appeals courts is subject to such a monumental shift as occurs when the constitutional fact doctrine is applied to an issue. While the test is useful in the evaluation, it is not dispositive in determining when to

---

151. *See* Roth v. United States, 354 U.S. 476, 497-98 (1957) ("Since those [constitutional] standards do not readily lend themselves to generalized definitions, the constitutional problem in the last analysis becomes one of particularized judgments which the appellate courts must make for themselves.").

152. *Bose Corp.*, 466 U.S. at 502. ("[T]he constitutional values protected by the [constitutional fact doctrine] make it imperative that judges—and in some cases judges of this Court—make sure that it is correctly applied.").

153. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964) ("This court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied.").

154. Monaghan, *supra* note 78, at 271.

155. *Id.* at 272.

156. *Id.* at 273. This rule is most closely associated with the values of the constitutional fact doctrine articulated above. *See supra* text accompanying note 133. However, it should be noted that, in general, Professor Monaghan disfavors the constitutional fact doctrine and believes that both of the situations mentioned are protected by traditional standard of review doctrine. *See* Monaghan, *supra* note 78, at 264-71.

157. 466 U.S. 485, 508-11 (1984).

apply the doctrine. The Monaghan test gives sufficient weight to one policy consideration that supports the application of the doctrine, but fails to consider the competing considerations.

As mentioned above, the Supreme Court has not stated a rule which dictates when the doctrine is applied. The absence of such a clear rule might indicate that the Court does not desire to establish a bright line to guide the lower courts. Instead, the prudential concerns relevant to an application of a deferential standard of review to factual findings should be evaluated. This analysis seems more consistent with precedent.[158]

Thus, if a constitutional rule is in question, and that rule requires close appellate scrutiny in its development and application, a presumption in favor of applying the constitutional fact doctrine is created. However, this finding does not end the analysis. Each other policy rationale, both supporting and denying application of the constitutional fact doctrine, should be analyzed and weighed. If the policies which compel an appeals court to retain power and control over the constitutional issue outweigh the systemic concerns of the judiciary, the doctrine is applied.[159] Accordingly, trial court factual[160] determinations which directly implicate, invoke, or require the application of the constitutional principle receive no deference when reviewed by an appellate court.[161]

B. Application to "Seizure" Determinations

The similarity between the policies which determine the application of the constitutional fact doctrine and those which divide issues of law from issue of fact are not necessarily coincidental or surprising.[162] Also

---

158. Arguably, *Bose Corp.* was an example of the Court weighing the requirements of FED. R. CIV. P. 52(a) and its clearly erroneous standard of review with the grave constitutional ramifications of a trial court's factual findings in defamation actions. *See Bose Corp.*, 466 U.S. 500-01. In *Bose Corp.*, the Court stated:

> One might therefore assume that the cases in which the appellate courts have a duty to exercise independent review are merely those in which the presumption that the trial court's ruling is correct is particularly weak. *The difference between the two rules, however, is much more than a mere matter of degree.*

Id. (emphasis added).

159. Here, "systemic concerns" refers to those considerations discussed supra which militate against applying the doctrine of constitutional fact. Among them, the concepts of judicial efficiency, economy, and fairness to the parties are crucial.

160. Of course the legal determinations, i.e. what the actual constitutional rule is, certainly receives no deference due to the long established role of the appeals court to review de novo the legal findings of the trial court.

161. Thus, if the constitutional fact doctrine is applied to an issue, all facets of the determination receive a de novo review. The legal determinations, the factual findings, and the application of the facts to the law would all fall within the realm of a full appellate review.

162. *See supra* text accompanying note 93.

unsurprising is that those policies which favor application of the doctrine also favor treating a mixed question of law and fact as a question of law to be reviewed de novo by an appeals court.[163] As a result, the balancing which determines if the doctrine of constitutional fact applies to a seizure determination is similar to the analysis that determines the standard of review applied to a mixed question of law and fact.[164]

1. Doctrinal Inefficiency and Seizure Findings.—The most compelling factor supporting application of the constitutional fact doctrine is the consistency and fairness derived from continuing appellate scrutiny, resulting in consistent application of a certain constitutional norm.[165] Weighed against this value is the cost to the judicial system, in terms of efficiency and economy, of shifting power away from the trial courts in favor of the appellate level. Further, any resulting unfairness to the litigants by having an appeals court determine the facts from the record rather than live proceedings militates against the application of the doctrine.[166]

The seizure determination has consistently been labelled a fact intensive inquiry by the courts.[167] The absence or presence of a single fact often determines if a Fourth Amendment seizure occurred.[168] Further, at this late date in the development of the role of the trial court, it is presumed that these front-line tribunals are more capable of accurately determining the facts than appellate courts. Any shifting of fact-finding duties away from the trial court, especially if the legal issue is fact sensitive, creates inefficiency in the administration of the judicial system. Such a power shift disturbs the traditional role of the trial courts vis-a-vis appellate courts and thrusts the duty of fact-finding on the level of the judiciary most inappropriately designed to determine facts.

2. Prejudice, Unfairness, and Constitutional Facts.—Another critical consideration is the close relationship between a finding of guilt or

---

163. This statement is not exactly correct. The weighing process does not decide that a mixed question of law and fact is to be treated as one or the other in the application of a standard of review. As stated supra, mixed questions are a category among themselves and require the application of a distinct, separate analysis to determine the applicable standard of review. *See supra* text accompanying note 92.

164. *See supra* text accompanying note 92.

165. Inherent in this statement are the considerations of consistent application of constitutional law, protection of vital constitutional values, and the special duty of the appellate courts to supervise lower court application of constitutional principles.

166. *See supra* text accompanying notes 136-39.

167. *See, e.g.*, Michigan v. Chesternut, 486 U.S. 567, 573 (1988) ("[W]hat constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.").

168. *See, e.g.*, California v. Hodari D., 111 S. Ct. 1547 (1991).

innocence of a criminal defendant and the admissibility of evidence. The admissibility of evidence often depends upon the legality of the encounter between the defendant and law enforcement. Under such circumstances, the Fourth Amendment may determine, in practical terms, the guilt or innocence of the defendant. Assuming the correctness of this premise, that trial courts are the most capable fact-finders in the judicial system, and, given that the seizure determination is fact intensive, fairness requires that the duty of determining the facts, and thus "seizures," remain in the trial court. If trial courts are more capable of accurately determining the facts than appellate courts, it necessarily follows that the probability an appellate court will make incorrect findings is higher than the possibility of error in the trial court. Thus, with de novo review both parties to a criminal action are forced to rely on the level of the judicial system most likely to err in factual analysis. These facts determine, probably, the issue which decides the guilt or innocence of the criminal defendant. Especially in criminal actions, fairness to the defendant requires that the level of the judicial system most likely to correctly determine an issue be given that responsibility.

3. Counterweight: Consistent Constitutional Judications.—The competing value of consistent and correct application of constitutional principles must be weighed against these considerations of efficiency, economy, and fairness. A citizen is seized by the police if a reasonable person, in view of all the circumstances, would have believed he was not free to leave. If the seizure occurred, and probable cause to "seize" the person was absent, the Fourth Amendment was violated. Whether a seizure occurred and the legality of the seizure are the constitutional principles applied in the seizure issue. It may be assumed that de novo review of these principles increases the likelihood of their consistent and correct application.[169] However, the true issue is whether the marginal benefits derived from this increase in consistency outweigh the costs to both the litigants and judicial system in terms of lost economy, efficiency, and fairness resulting from a de novo review of factual findings.

The objective test used to determine whether a seizure occurred has existed, in essentially identical form, since *Mendenhall* was decided in 1980. In the twelve years since this decision, numerous trial courts have applied this test to determine if a citizen's encounter with law enforcement officers resulted in a Fourth Amendment seizure. At this point, it seems unlikely that the marginal benefits of continued de novo review by the

---

169. *But see* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2460 (1990) (stating that "some variation in the application of a standard based on reasonableness is inevitable. 'Fact-bound resolutions cannot be made uniform through appellate review, de novo or otherwise.'").

appeals courts outweigh the costs incurred by the judicial system and the litigants.[170] Also, considering the increasing caseload of both the appellate and trial courts, every opportunity should be taken to more efficiently allocate work between the levels of the judicial system.

4. A Balancing Act.—Efficiency alone does not allow the courts to compromise the application of vital constitutional rights. However, these rights seem to be adequately protected by the traditional allocation of labor between trial and appellate courts resulting from the application of traditional standards of review. Under this approach, an appeals court still reviews de novo the legal determinations of the trial court to ensure the correct principles of law are applied. More importantly, the appeals court retains the ability to review the seizure determination for clear error. The risk of a marginal loss of consistency in the application of constitutional principles, which might result from limiting review of the seizure issue to clear error, does not outweigh the prudential concerns of the judiciary or the risk of prejudice to the litigants if a de novo review is allowed.

V. Conclusion

A. Policy Considerations Dispositive

This discussion stressed the relative unimportance of attempting to conclusory label the seizure issue to assist in determining what standard of review should be applied upon appeal. Whether the issue is called a factual finding, a legal determination, or a constitutional fact, the only principled analysis in which the courts may engage is one that carefully considers the policy values sought to be protected under the Fourth Amendment. The result of this analysis indicates that the litigants, the judicial system, and the Fourth Amendment are best served by limiting the scope of appellate review of a trial court's seizure determination to one of clear error.

B. An Unnecessary Distinction

Although the law-fact distinction and the doctrine of constitutional fact were discussed separately, it is arguable whether a separate and distinct analysis is advised or whether the doctrine of constitutional fact is merely a sub-category, or a consideration, when determining the

---

170. This may be evidenced by a majority of the courts of appeals adopting a clearly erroneous standard of review for the seizure issue. Though counting the circuits on each side of a question never determines the wisest judicial policy, the numbers are indicative of a trend in jurisprudential thought.

standard of review to apply to a mixed question of law and fact. As noted, those same prudential concerns which indicate that a mixed question should receive de novo review also support the application of the doctrine and accordingly the application of the de novo review. The better analysis, possibly, is to consider that a Constitutional principle is being determined as a factor which may indicate that a mixed question should receive de novo review. Considering the voluminous criticism of the constitutional fact doctrine which exists, along with the complexities involved in separately analyzing a given issue under this doctrine, it may be most efficient and wise for the courts to collapse the doctrine into the mixed question standard of review framework. If a mixed question requires the adjudication of a vital constitutional principle which the appeals courts are unwilling to relinquish to the trial courts, the scales would be tilted greatly towards a de novo review of the mixed question.

C. Fairness, Efficiency, and Economy

Regardless of how the standard of review is discerned, the most important concern is that the fundamental considerations of fairness, efficiency, and economy are the underlying values which dictate the result. When a trial court's determination that a defendant was, or was not "seized" in terms of the Fourth Amendment is reviewed on appeal, these concerns compel a review limited to clear error.

The Scope of Federal Preemption: How Far May States Go in Regulating Multiple Employer Welfare Arrangements Established Under ERISA?

CATHERINE M. MORRISON*

INTRODUCTION

The Employee Retirement Income Security Act of 1974[1] (ERISA) is a comprehensive federal statute dealing with all significant aspects of employee benefit and pension plans and the protection of employee benefit rights.[2] Congress, in choosing to implement an all-encompassing federal statutory scheme with regard to employee benefit plans, has asserted federal jurisdiction[3] over an area which concerns virtually every employee in the United States and has exercised its constitutional supremacy over state laws operating in the realm of employee benefits.[4] It is this area, namely ERISA's preemptive scope over state laws purporting to regulate employee benefits and employee benefit plans, that has been the subject of extensive debate and litigation since the legislation was enacted in 1974.

This Note will first provide a general overview of ERISA, including its historical origin, the purposes and intent of its enactment, and its general preemptive scope over state laws purporting to regulate employee benefit plans. It will then address ERISA preemption with regard to a specific type of ERISA benefit plan known as a multiple employer welfare arrangement.

I. GENERAL OVERVIEW OF ERISA

In order to gain a basic understanding of the preemptive scope of ERISA, it is necessary to understand how the legislation developed, what

---

* J.D. Candidate, 1993, Indiana University—Indianapolis; B.A., 1990, DePauw University.

1. 29 U.S.C. §§ 1001-1461 (1988 & Supp. II 1990).
2. *Id.* § 1001.
3. *Id.* § 1144(a).
4. Federal supremacy over state law is established in the Constitution's Supremacy Clause, which states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

problems it was intended to address, and what position Congress intended it to hold with respect to state laws. Gaining this understanding requires a comprehensive study of the legislative history of the Act and the text of its provisions relating to preemption, as well as subsequent case precedent addressing the scope of the statute's authority. It is only after such an analysis is complete that the scope of ERISA's preemption of state law in the specific case of multiple employer welfare arrangements may be fully addressed and understood.

A. Historical Origins of ERISA

ERISA was enacted in 1974 after several years of consideration by Congress of related legislation.[5] Prior to 1974, no comprehensive federal statutory scheme existed in the area of employee benefits. The principal purposes of the legislation can be found in the Act's subtitle, Protection of Employee Benefit Rights, and in its initial provisions which codify congressional intent and policy.[6] The three primary purposes found in

---

5. Several bills were introduced in Congress in the early 1970s with regard to regulation of employee benefits before ERISA was enacted in its present form. Some of these Senate and House bills included the following: H.R. REP. No. 12906, 93rd Cong., 2nd Sess. (1974); H.R. REP. No. 12855, 93rd Cong., 2nd Sess. (1974); H.R. REP. No. 9824, 93rd Cong., 1st Sess. (1973); H.R. REP. No. 4200, 93rd Cong., 1st Sess. (1973); H.R. REP. No. 462, 93rd Cong., 1st Sess. (1973); H.R. REP. No. 2, 93rd Cong., 1st Sess. (1973); S. REP. No. 1631, 93rd Cong., 1st Sess. (1973); S. REP. No. 1557, 93rd Cong., 1st Sess. (1973); S. REP. No. 1179, 93rd Cong., 1st Sess. (1973); S. REP. No. 4, 93rd Cong., 1st Sess. (1973).

6. 29 U.S.C. §§ 1001-03 (1988 & Supp. II 1990). The basic congressional findings and policy are outlined at § 1001, which states:

> (a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of the employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax

the text of this first section include "assuring the equitable character of such plans and their financial soundness,"[7] "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, . . . providing appropriate remedies, sanctions, and ready access to the Federal courts,"[8] and finally "requiring . . . [benefit plans] to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and . . . [provide] plan termination insurance."[9] The ends sought to be achieved by each of these purposes are threefold: to protect the interests of employees and their beneficiaries, to protect interstate commerce, and to protect the federal taxing power, all thought to be of growing concern due to the substantial growth of employee benefit plans nationwide.[10]

The Supreme Court has interpreted the purpose and function of ERISA as "impos[ing] upon pension plans a variety of substantive requirements relating to participation, funding, and vesting. . . . It also establishes various uniform procedural standards concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. . . . It does not regulate the substantive content of welfare benefit plans."[11] The Court has interpreted congressional intent in creating this legislation as providing the necessary continuity in administration of employee benefit plans in the best interest of the beneficiaries.[12]

The historical development of the legislation is apparent from the legislative history from both the Senate and the House of Representatives during the debate regarding its enactment, at which time Congress advocated a nationally regulated plan for employee benefits. This strong

---

> treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

Id. § 1001.

7. *Id.* § 1001(a).
8. *Id.* § 1001(b).
9. *Id.* § 1001(c).
10. *Id.* § 1001(a).
11. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985) (citations omitted). For related ERISA provisions, see 29 U.S.C. §§ 1051-86, 1021-31, 1101-14 (1988 & Supp. II 1990).
12. Shaw v. Delta Airlines, Inc., 463 U.S. 85, 92 (1983).

advocacy led to the codification of the legislative goals as expressed in congressional findings and declarations of policy.[13]

B. Preemption Provisions of ERISA

The text of ERISA specifically addressed Congress' position with regard to preemption of state laws relating to employee benefit plans. The portion of ERISA specifically dealing with preemption states:

> Except as provided in subsection (b) [the saving clause] of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws[14] insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.[15]

Subsection (b)(2)(A) of 29 U.S.C. § 1144 goes on to save from this preemption "any law of any State which regulates insurance, banking, or securities."[16] However, 29 U.S.C. § 1144(b)(2)(B) limits the saving power of 29 U.S.C § 1144(b)(2)(A) by not allowing an employee benefit plan to be "deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." [17] Finally, 29 U.S.C. § 1144(d) provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."[18]

As is apparent from these provisions, the wording clearly establishes federal supremacy in general, as well as the validity of any federal law. From the plain meaning of the preemption, saving, and deemer clauses,

---

13. 29 U.S.C. § 1001 (1988). For the relevant portions of the legislative history of ERISA, see 120 CONG. REC. 29,197-29,933 (1974); H.R. CONF. REP. No. 1280, 93rd Cong., 2d Sess. (1974); S. CONF. REP. No. 1090, 93rd Cong., 2d Sess. (1974).

14. This section defines the term "state law" as "includ[ing] all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States." 29 U.S.C. § 1144(c)(1) (1988). It goes on to define the term "state" as "includ[ing] a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." *Id.* § 1144(c)(2).

15. 29 U.S.C. § 1144(a) (1988) [hereinafter preemption clause].

16. *Id.* § 1144(b)(2)(A) [hereinafter saving clause].

17. *Id.* § 1144(b)(2)(B) [hereinafter deemer clause].

18. *Id.* § 1144(d).

however, it is more difficult to determine exactly what the legislature intended as the scope of their effect. Hence, the actual scope of preemption has been a significant matter of litigation and has culminated in the Supreme Court adopting an expansive reading of these clauses so as to eliminate to a large extent any state regulation in the area of employee benefit plans.[19]

C. The Supreme Court's View of ERISA's Preemptive Scope

The issue of state law preemption by ERISA was extensively addressed for the first time in the Supreme Court's 1983 decision in *Shaw v. Delta Airlines, Inc.*[20] In this case, the Court held that ERISA's broad preemption provision was intended to preempt any state law that "related to" any employee benefit plan, not merely those state laws that directly conflicted with a substantive provision in the federal statute.[21] The Court determined that in deciding whether federal preemption occurs with respect to a certain state law, it must be shown that the law in question "relates to" an employee benefit plan within the meaning of 29 U.S.C. § 1144(a).[22] "Relates to," in this context, is given its broad common sense meaning, such that a state law relates to employee benefit plans if it has either a connection with or reference to such a plan.[23] Once it is determined that the state law relates to employee benefit plans, it is preempted by ERISA unless it is saved by the exceptions listed in 29 U.S.C. § 1144(b)(2)(A), namely it is a law which regulates insurance, banking, or securities.[24]

The Court believed that such a broad interpretation of ERISA preemption was necessary to make administration of nationwide employee benefit plans possible, because the Court believed that "[t]he administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction within a plan [was] apparent."[25] This, according to the Court, fulfilled the intent of Congress to provide a comprehensive federal program to "'round out the protection afforded [employee benefit

---

19. *See* FMC Corp. v. Holliday, 111 S. Ct. 403 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).

20. 463 U.S. 85 (1983).

21. *Id.* at 108-09.

22. *Id.* at 97.

23. *Id.* This view was recently reinforced by the Supreme Court in Ingersoll Rand Co. v. McClendon, 111 S. Ct. 478, 483 (1990) ("Under this 'broad common sense meaning,' a state law may 'relate to' a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, or the effect is only indirect.").

24. *Shaw*, 463 U.S. at 98.

25. *Id.* at 107-08. *See also Id.* at 105 n.25.

plan] participants by eliminating the threat of conflicting and inconsistent State and local regulation.'"[26]

The broad standard for preemption and the interpretation of legislative intent outlined in *Shaw* were again reflected by the Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*.[27] However, *Metropolitan Life* went further in that it applied *Shaw*'s broad interpretation of legislative intent to the saving and deemer clauses of ERISA.[28] *Metropolitan Life* involved the issue of state laws regulating insurance and insurance contracts, thus bringing to bear the saving clause's exception from preemption for state laws regulating insurance.

The insurance issue presented in *Metropolitan Life* made it necessary for the Court to attempt to reconcile the functions of the saving clause in conjunction with the deemer clause, a task that the Court found difficult because of the possible conflicting interpretations in the language of each provision.[29] In making its interpretation, the Court " '[began] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresse[d] the legislative purpose.' "[30] The Court also utilized the presumption that "Congress did not intend to preempt areas of traditional state regulation."[31] In

---

26. *Id.* at 99 (quoting 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent)). The same purpose was expressed by Senator Williams in addressing the Senate. He stated:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provision, of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 CONG. REC. 29,933 (1974) (statement of Sen. Williams).

27. 471 U.S. 724 (1985).

28. 29 U.S.C. § 1144(b)(2)(A)-(B) (1988).

29. With regard to the preemption sections of ERISA, the Court stated:

> The two preemption sections, while clear enough on their faces, perhaps are not a model of legislative drafting, for while the general preemption clause broadly preempts state law, the saving clause appears broadly to preserve the States' lawmaking power over much of the same regulation. While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time.

471 U.S. 724, 739-40 (1985) (footnote omitted). The Court went on to acknowledge attempts by Congress to clarify this problem, such as by introducing a bill in 1979 to amend ERISA to provide that certain types of state mandated benefit statutes are not within the scope of the saving clause. However, this legislation died before it was even debated in the Senate. *Id.* at 740 n.16.

30. *Id.* at 740 (quoting Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985)).

31. *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

other words, there exists in legislative interpretation a presumption against federal preemption, and the Court will not construe federal statutes in such a way that would enlarge their preemptive scope.[32]

In applying the ordinary language of the three preemption clauses of 29 U.S.C. §§ 1144(a) and 1144(b) in light of the aforementioned presumption, the Court declined to impose any limitations on the saving clause beyond those contained in the deemer clause. However, the limitation provided by the deemer clause, namely that plans established under the provisions of ERISA may not be deemed insurance companies for purposes of state regulation, was broadly interpreted. This broad interpretation resulted in the conclusion that self-insured ERISA plans[33] are in effect preempted from state regulation by means of the deemer clause. Insured plans, plans that purchase insurance for their beneficiaries, are directly affected by state laws regulating the insurance industry by means of their outside insurer's subjection to these state laws, and insured plans are thus indirectly subject to state insurance regulation.[34] This is permissible based on the language of ERISA's saving clause.[35]

The Court in *Metropolitan Life* acknowledged the fact that the decision "result[ed] in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing, [the Court] . . . merely [gave] . . . life to a distinction created by Congress in the 'deemer clause,' a distinction [of which] Congress is aware . . . and . . . has chosen not to alter."[36] This decision resulted in a broad interpretation of the deemer clause, which as a general rule removes self-insured employee benefit plans from the realm of state regulation altogether, thus reinforcing the trend established in *Shaw* of interpreting ERISA as having an expansive preemptive scope.

The Court in *Metropolitan Life* faced another issue with regard to ERISA preemption of state insurance laws, that of a possible conflict with different federal legislation, the McCarran-Ferguson Act.[37] In the McCarran-Ferguson Act, Congress provided that the "business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such

---

32. *Id.* at 741.

33. Self-insured plans, according to the Court, are plans that do not purchase insurance for their participants from an outside insurer and are therefore not bound by the terms of an insurance contract. *Id.* at 732.

34. *Id.*

35. 29 U.S.C. § 1144(b)(2)(a) (1988). *See supra* note 16 and accompanying text.

36. 471 U.S. at 747 (footnote omitted).

37. 15 U.S.C. §§ 1011-15 (1988). Congress, in drafting ERISA, provided for the validity of coexisting federal law, so that a reading of ERISA's preemptive score that infringed upon another federal law would necessarily fail. *See supra* note 6 and accompanying text.

business."[38] This appears to conflict with an expansive interpretation of the deemer clause excepting self-insured ERISA plans from state insurance regulation and, thus, does not appear to conform with 29 U.S.C. § 1144(d) of ERISA preserving the validity and enforceability of other federal laws.[39] The Court resolved this conflict by concluding that outside insurers of ERISA plans, subject to state regulation in accordance with McCarran-Ferguson, bring those plans within the scope of state insurance regulations by means of their insurance contracts. This regulation by means of insurance contract is within the scope of the saving clause and is therefore permissible, thus respecting the applicable provision of McCarran-Ferguson.[40] The Court's conclusion did not, however, clear up the problem of conflicts with the McCarran-Ferguson Act, and this conflict will again be present with regard to the possibility of ERISA preemption of state insurance laws regulating multiple employer welfare arrangements.[41]

The most recent Supreme Court decision regarding ERISA's preemption of state laws, and specifically state insurance laws, was the 1990 decision in *FMC Corp. v Holliday*.[42] In this case, which involved a Pennsylvania insurance subrogation law, the Court held that "[i]n view of Congress' clear intent to exempt from direct state insurance regulation ERISA employee benefit plans, we hold that ERISA preempts the application of [this insurance law] to the FMC Salaried Health Care Plan."[43] The Court further pointed out that "[t]he preemption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA."[44] In making this determination, the Court rejected respondents' arguments,[45] which read the

---

38. 15 U.S.C. § 1012(a) (1988).

39. 29 U.S.C. § 1144(d) (1988).

40. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985). This reconciliation with the McCarran-Ferguson Act was explained more clearly in the later decision of FMC v. Holliday, 111 S. Ct. 403, 410 (1990) ("By recognizing a distinction between insurers of plans and the contracts of those insurers, which are subject to direct state regulation, and self-insured employee benefit plans governed by ERISA, which are not, we observe Congress' presumed desire to reserve to the States the regulation of the 'business of insurance.' ").

41. *See infra* note 106 and accompanying text.

42. 111 S. Ct. 403 (1990).

43. *Id.* at 411.

44. *Id.* at 407.

45. Justice Stevens' dissent agreed with respondents' argument that ERISA only preempts state laws that conflict with core ERISA concerns. Justice Stevens goes on to disagree with the distinction between insured and self-insured ERISA plans, and expresses the belief that the majority is reading the preemption and deemer clauses too broadly. *Id.* at 411-13.

deemer clause narrowly, only exempting from the saving clause "state insurance regulations that are pretexts for impinging on core ERISA concerns,"[46] and accepted its own interpretation in prior decisions.[47] The Court expressed the belief that allowing such an expansive preemptive scope of ERISA does not permit the deemer clause to engulf the saving clause, because the saving clause still functions independently to protect insurance contracts purchased by insured employee benefit plans.[48]

The Supreme Court in each decision gave an expansive scope to state law preemption which it determined as the intent of Congress in enacting the legislation.[49] The Court agreed that such an expansive scope is necessary in order to ensure orderly administration of employee pension and benefit plans, as well as consistency and uniformity in regulation of such plans.[50] Such consistency and uniformity was believed to be necessary to "achieve [the] goal of well regulated private pension plans"[51] and ultimately protect the interests of individual employees who are beneficiaries of such plans.

II. The Problem of Multiple Employer Benefit Plans and Attempts at Judicial Solutions

Problems with preemption by ERISA of state laws and regulations for certain types of benefit plans became apparent in the late 1970s.[52] During this time, a certain type of benefit plan called a multiple employer trust became prevalent. Such trusts were set up under the title of employee benefit plans and utilized the preemption provisions of ERISA to escape the scrutiny of state insurance regulations. However, ERISA contained no provisions specifically relating to multiple employer trusts,[53] and they

---

46. *Id.* at 410.

47. *Id.* at 411. *Accord* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 46 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 741 (1985); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981).

48. FMC Corp. v. Holliday, 111 S. Ct. 403, 411 (1990).

49. *See supra* note 26.

50. *FMC Corp.*, 111 S. Ct. at 410-11.

51. President's Message to Congress Transmitting Reorganization Plan No. 4 of 1978, 14 Weekly Comp. Pres. Doc. 1401 (Aug. 10, 1978).

52. David Gregory, *The Scope of ERISA Preemption of State Law: A Study in Effective Federalism*, 48 U. Pitt. L. Rev. 427 (1987).

53. ERISA requires welfare benefit plans to conform to fiduciary standards as well as reporting and disclosure requirements. 29 U.S.C. §§ 1051(1), 1081(a)(1) (1988). However, ERISA does not require welfare benefit plans to be funded or insured, thus allowing such plans to exist under considerably less scrutiny than pension plans established under ERISA or similar insurance plans governed by state law. Thus a problem with lack of regulation could exist, and allow mismanagement of multiple employer trusts at the

were thus permitted to operate largely outside the scope of any regulation. As a result of this regulatory vacuum, many multiple employer trusts were mismanaged and went bankrupt, leaving the employee beneficiaries without benefits.[54]

Some federal courts attempted to control the problems brought about by this lack of regulation by declaring multiple employer trusts outside the definition of employee benefit plans under ERISA, and instead declaring such trusts insurance providers.[55] These courts advanced the proposition that multiple employer trusts could not provide employees with insurance programs under the guise of employee benefit plans and thus receive the benefit of exemption from state insurance regulations by ERISA without specific federal regulations to ensure their financial stability. In *Bell v. Employee Security Benefit Ass'n.*,[56] the Kansas federal district court stated that "just as a state cannot regulate an 'employee benefit plan' by calling it 'insurance,' neither can . . . [a multiple employer trust] merchandise an insurance program, free of state regulation, by terming it an 'employee benefit plan.'"[57]

In response to the problems created by multiple employer trusts in the years following the enactment of ERISA, as well as the courts' attempts to solve those problems, Congress amended ERISA in 1982. The 1982 amendments added to ERISA several sections dealing with preemption as it specifically relates to multiple employer benefit plans.[58] However, amending ERISA has not completely solved the problem of multiple employer arrangements, as the scope of the additional preemption provision has not yet been determined.

---

expense of the employee beneficiaries. This problem prompted the 1982 amendments to ERISA specifically addressing preemption of state law by multiple employer welfare arrangements. For an in-depth discussion of the problems with uninsured benefit plans, see David J. Brummond, *The Legal Status of Uninsured, Noncollectively-Bargained Multiple-Employer Welfare Trusts Under ERISA and State Insurance Laws*, 28 SYRACUSE L. REV. 701 (1977); Linda L. Lanam, *Public Regulation of Self-Insured and Uninsured Employee Benefit Plans—Who is to be Protected? A State Regulator's Perspective*, 19 FORUM 309 (1984).

54. Gregory, *supra* note 52, at 432.

55. Taggert Corp. v. Efros, 475 F. Supp. 124 (S.D. Tex. 1979); Wayne Chem., Inc. v. Columbus Agency Serv. Corp., 567 F.2d 692 (7th Cir. 1977); Bell v. Employee Sec. Benefit Ass'n, 437 F. Supp. 382 (D. Kan. 1977). In *Wayne Chemical*, the Seventh Circuit Court of Appeals held that insurers and group insurance policies such as the one issued by defendant were not preempted by ERISA and, therefore, were subject to state insurance regulations, even though the insurance in question was purchased by an employee benefit plan established under ERISA. 567 F.2d at 700.

56. 437 F. Supp. 382 (D. Kan. 1977).

57. *Id.* at 390.

58. 29 U.S.C. § 1144(b)(6) (1988).

III. Attempted State Insurance Regulation of Multiple Employer Welfare Arrangements: Possible Conflicts with ERISA Preemption

The issue of preemption of state law, specifically state insurance regulations, becomes more complicated when examining a certain type of multiple employer benefit plan called a multiple employer welfare arrangement. The 1982 amendments to ERISA added specific provisions dealing with multiple employer welfare arrangements. Under these new provisions, such an arrangement is defined as an employee welfare benefit plan, or any other arrangement other than an employee welfare benefit plan, "which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1)[59] to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries."[60] Once a multiple employer welfare arrangement is established as an ERISA plan, it is subject to the same provisions of ERISA as any other type of employee benefit plan, including the preemption, saving, and deemer clauses. The purposes of ERISA as well as the intent of Congress when enacting the legislation remain fully in effect just as they are with respect to single employer plans.

In addition, ERISA contains another provision dealing specifically with preemption of state laws regulating multiple employer welfare arrangements which provides that "in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement . . . ."[61] The terms

---

59. Paragraph 1, as referred to in the above definition, provides:

For purposes of this subchapter:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1) (1988 & Supp. II 1990).

60. *Id.* § 1002(40)(A).

61. *Id.* § 1144 (b)(6)(A)(i). This section goes on to provide that fully insured multiple employer welfare arrangements are subject to state insurance regulations.

> [A]ny law of any State which regulates insurance may apply to such arrangement

of this provision apply specifically to fully insured multiple employer welfare arrangements. In addition, with regard to other multiple employer welfare arrangements, ERISA goes on to state that "any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter."[62]

Based upon the separate and distinct category established for multiple employer welfare arrangements by the provisions of the 1983 amendments and reasons of public policy, a movement has been enacted by several states attempting to subject all multiple employer welfare arrangements to extensive insurance regulations.[63] This regulation has been strongly disputed by the administrators of multiple employer welfare arrangements in those jurisdictions, who assert that such state regulation is preempted by ERISA based upon the expansive view of preemption advocated by the Supreme Court.[64] In order to determine the strength of the preemption argument by administrators of multiple employer welfare arrangements, as well as the possible stand the federal courts might take in this regard, it is important to examine the laws of the states that have addressed the issue. This Note will then specifically examine the argument and policies behind including self-insured multiple employer welfare arrangements in ERISA preemption.

A. Enactment of Regulatory State Legislation

Of the six states that have enacted legislation regulating multiple employer welfare arrangements under each states' respective insurance laws,[65] four have enacted such legislation in 1991.[66] It is for that reason that no definitive answer has been reached by either the state or federal courts in those jurisdictions regarding the validity of this particular

---

> to the extent that such law provides (I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and (II) provisions to enforce such standards . . . ."

Id.

62. *Id.* § 1144(b)(6)(A)(ii).

63. The following states have enacted statutes subjecting multiple employer welfare arrangements to state insurance regulations: Arkansas (ARK. CODE ANN. § 23-86-202 (Michie 1992) (amended 1991)), Florida (FLA. STAT. ANN. § 624.437 (West 1984 & Supp. 1992)), Indiana (IND. CODE § 27-1-34 (Supp. 1992) (amended 1991)), Michigan (MICH. STAT. ANN. § 500.7004 (West Supp. 1992)), New Mexico (N.M. STAT. ANN. § 59A-1-8.1 (Michie 1992)), and South Dakota (S.D. CODIFIED LAWS ANN. § 58-18B-1 (Supp. 1991)).

64. *See supra* note 47.

65. *See supra* note 63.

66. *Id.*

legislation. This is in fact an issue that has not yet been conclusively resolved by any court.

The statutes passed in each jurisdiction hold multiple employer welfare arrangements to essentially the same requirements under each state's respective insurance code.[67] In each state, multiple employer welfare

---

67. The Arkansas Code provides the following requirements for regulating multiple employer welfare arrangements:

23-86-202 Definitions [effective Jan. 1, 1992]

(1) "Small employer" means any person, firm, corporation, partnership, or association actively engaged in business who, on at least fifty percent (50%) of its working days during the preceding year, employed no more than twenty-five (25) eligible employees. In determining the number of eligible employees, companies which are affiliated companies or which are eligible to file a combined tax return for purposes of state taxation shall be considered one (1) employer;

(2) "Carrier" means any person who provides health insurance in this state. For the purposes of this subchapter, carrier includes a licensed insurance company, a prepaid hospital or medical service plan, a health maintenance organization, a multiple employer welfare arrangement, or any other person providing a plan of health insurance subject to state insurance regulation;

(3)(A) "Health benefit plan" or "plan" means any hospital or medical expense incurred policy or certificate, hospital or medical service plan contract, or health maintenance organization subscriber contract.

(B) "Health benefit plan" does not include accident-only, credit, dental, or disability income insurance; coverage issued as a supplement to liability insurance; worker's compensation or similar insurance; or automobile medical-payment insurance;

(4) "Small employer carrier" means any carrier which offers health benefit plans covering the employees of a small employer;

(5) "Case characteristics" means demographic or other relevant characteristics of a small employer, as determined by a small employer carrier, which are considered by the carrier in the determination of premium rates for the small employer. Claim experience, health status, and duration of coverage since issue are not case characteristics for the purposes of this subchapter;

(6) "Commissioner" means the State Insurance Commissioner;

(7) "Department" means the State Insurance Department;

(8) "Base premium rate" means, for each class of business as to a rating period, the lowest premium rate charged or which could have been charged under a rating system for that class of business, by the small employer carrier to small employers with similar case characteristics for health benefit plans with the same or similar coverage;

(9) "New business premium rate" means, for each class of business as to a rating period, the premium rate charged or offered by the small employer carrier to small employers with similar case characteristics for newly issued health benefit plans with the same or similar coverage;

(10) "Index rate" means, for each class of business for small employers with similar case characteristics, the arithmetic average of the applicable base premium rate and the corresponding highest premium rate;

(11) "Class of business" means all or a distinct grouping of small employers

arrangements are required to conform to specific provisions of their insurance regulations, generally requiring multiple employer welfare arrangements to file a policy or certificate and an annual financial statement with the state department of insurance, to obtain a certificate of authority from the state department of insurance, to notify the Department if there is a threat of financial hardship, and to obtain actuarial certification.[68]

This significant regulation under each state's insurance laws has been enacted by the legislatures under the belief that such regulation is per-

---

as shown on the records of the small employer carrier;

(A) A distinct grouping may only be established by the small employer carrier on the basis that the applicable health benefit plans:

(i) Are marketed and sold through individuals and organizations which are not participating in the marketing or sale of other distinct groupings of small employers for such small employer carrier;

(ii) Have been acquired from another small employer carrier as a distinct grouping of plans;

(iii) Are provided through an association with membership of not less than two (2) or more small employers which has been formed for purposes other than obtaining insurance; or

(iv) Are in a class of business that meets the requirements for exception to the restrictions related to premium rates provided in subparagraph (A)(1)(a) of § 23-86-204 of this subchapter;

(B) A small employer carrier may establish no more than two (2) additional groupings under each of the subparagraphs in subdivision (11)(A) of this subsection on the basis of underwriting criteria which are expected to produce substantial variation in the health care costs;

(C) The commissioner may approve the establishment of additional distinct groupings upon application to the commissioner and a finding by the commissioner that such action would enhance the efficiency and fairness of the small employer insurance marketplace;

(12) "Actuarial certification" means a written statement by a member of the American Academy of Actuaries or other individuals acceptable to the commissioner that a small employer carrier is in compliance with the provisions of § 23-86-204 of this subchapter based upon the person's examination, including a review of the appropriate records and of the actuarial assumptions and methods utilized by the carrier in establishing premium rates for applicable health benefit plans;

(13) "Rating period" means the calendar period for which premium rates established by a small employer carrier are assumed to be in effect, as determined by the small employer carrier.

ARK. CODE ANN. § 23-86-202 (Michie 1992) (amended 1991). The statutes in Florida, Indiana, Michigan, New Mexico, and South Dakota contain essentially the same provisions, bringing multiple employer welfare arrangements squarely within the scope of state insurance regulation. *See supra* note 63. The extent to which these statutes are valid exercises of state regulation under 29 U.S.C. § 1144(b)(6) has not yet been decisively determined by the courts.

68. *See supra* note 67.

mitted by the less expansive scope of 29 U.S.C. § 1144(b)(6) and is necessary to protect the interests of the beneficiaries of such plans. Whether Congress intended states to have such regulatory control over multiple employer welfare arrangements is not clear by the wording of 29 U.S.C. § 1144(b)(6),[69] however, and a strong argument exists that legislatures have in fact stepped beyond their regulatory power under ERISA by implementing these regulations. Florida has recognized the possibility of preemption in a section of its statute which provides, "[T]his section[70] does not apply to a multiple employer welfare arrangement which offers or provides benefits which are fully insured by an authorized insurer or to an arrangement which is exempt from state insurance regulation in accordance with Pub. L. No. 93-406, the Employee Retirement Income Security Act."[71] By recognizing the role that ERISA plays in regulating such benefit plans, the Florida legislature has added strength to the argument that a real conflict between ERISA and the state regulations exists.

B. The Argument for the Application of Broad ERISA Preemption to Multiple Employer Welfare Arrangements

The recent implementation of these state regulations requiring multiple employer welfare arrangements to conform to various sections of state insurance codes introduces an issue regarding the extent of ERISA's general preemption provisions, namely the preemption, saving and deemer clauses,[72] as applied to multiple employer welfare arrangements. Section 1144(b)(6)(A) begins with the clause "[n]otwithstanding any other provision of this section . . .", and then goes on in clause (i) to allow certain defined state insurance regulations to apply to fully insured multiple employer welfare arrangements as well as to any arrangement subject to an exemption under subparagraph (B).[73] The exemption provided under subparagraph (B) states that "[t]he Secretary [of Labor]

---

69. *See supra* notes 61-62 and accompanying text.

70. FLA. STAT. ANN. § 624.437 (West 1984 & Supp. 1992).

71. *Id.* § 624.437(3). How and to what extent this clause has effected state regulation of multiple employer welfare arrangements is not known, however, because the issue of the scope of this Florida law has not been litigated. The lack of litigation on this issue by multiple employer welfare arrangements could indicate that the regulation has not been intrusive on their functioning, as it is likely that a significantly intrusive use of this statute for regulatory purposes would be challenged as either a violation of subsection (3) of the statute or 29 U.S.C. § 1144(b)(6). Indiana included a similar provision in its statute regulating multiple employer welfare arrangements. *See infra* note 88.

72. 29 U.S.C. §§ 1144(a), 1144(b)(2)(A)-(B) (1988). For the exact wording of these provisions, *see supra* text accompanying notes 15-17.

73. *Id.* § 1144(b)(6)(A).

may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured."[74] The exemption under clause (ii) includes "any other employee welfare benefit plan which is a multiple employer welfare arrangement," and allows application of any state insurance regulation "not inconsistent with the preceding sections of this title".[75] These clauses are complicated because they make it necessary to define and make distinctions between fully insured and self-insured multiple employer welfare arrangements, as well as to define what regulations may be inconsistent with preceding sections.

ERISA provides a definition of a fully insured multiple employer welfare arrangement within 29 U.S.C. § 1144. According to that definition:

> For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a state.[76]

The states' ability to regulate these fully insured plans is clear in the text of ERISA, which sets forth specific state insurance regulations that are permitted to apply to fully insured plans.[77] These regulations are limited to maintenance and enforcement of reserve and contribution requirements.[78] Although states appear to be afforded a very limited scope of regulatory power over fully insured plans, they in fact are not so limited, because plans that purchase insurance are directly affected by state laws that regulate their insurer and the insurance industry.[79] Thus, the extent to which states may regulate fully insured plans is relatively clear, and since states may reach these plans through regulation by the plan's insurer, it is unlikely that states will attempt to pass further regulations that might conflict with ERISA's preemptive scope.

The same is not true for self-insured multiple employer welfare arrangements. In order to determine to what extent a self-insured plan may be regulated by the states, regulation which is inconsistent with

---

74. *Id.* § 1144(b)(6)(B).

75. *Id.* § 1144(b)(6)(A)(ii). *See also supra* note 62 and accompanying text.

76. *Id.* § 1144(b)(6)(D).

77. *Id.* § 1144(b)(6)(A)(i). The text of this provision is stated previously in this article. *See supra* note 61 and accompanying text.

78. *Id.* § 1144(b)(6)(A)(i)(I).

79. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 732 (1985).

other provisions of ERISA must be defined.[80] What type of regulation would be inconsistent is not clearly defined by 29 U.S.C. § 1144(b)(6)(A)(ii) itself, but it appears that the provision does not allow conflict with the preemption, saving, and deemer clauses[81] or the basic objectives of the ERISA legislation.[82]

In order to remain consistent with the initial preemption provisions of ERISA, states may not enact laws that would for all practical purposes deem multiple employer welfare arrangements insurance companies.[83] A strong argument can be made that insurance regulations as extensive as those in the above-discussed statutes,[84] when applied to self-insured multiple employer welfare arrangements, in practice deem those plans insurance companies and are thus inconsistent with the deemer clause. A good example of this can be found in the applicable portions of the Indiana statute, which provide:

---

80. 29 U.S.C. § 1144(b)(6)(A)(ii) (1988).

81. *Id.* §§ 1144(a), 1144(b)(2)(A)-(B).

82. Along with the basic objectives and policies of ERISA set forth in 29 U.S.C. § 1001, *see supra* note 6, ERISA also contains objectives specifically addressing multiemployer plans. Section 1001a(c) states the policy of the Act to be:

> (1) to foster and facilitate interstate commerce, (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

Id. § 1001a(c). Although these policies specifically address multiemployer pension plans, not welfare benefit plans, an argument could be made that they do not include welfare benefit plans such as multiple employer welfare arrangements. However, these policies are consistently parallel with the general policies of ERISA set forth in 29 U.S.C. § 1001, and a strong argument can be made that under such circumstances, the legislature intended them to extend to any multiple employer plan validly established under ERISA.

83. *Id.* § 1144(b)(2)(B). In support of this position, the Court in *FMC Corp. v. Holliday* stated:

> We read the deemer clause to exempt self-funded ERISA plans from state laws 'regulat[ing] insurance' within the meaning of the saving clause. By forbidding States to deem employee benefit plans 'to be an insurance company or other insurer . . . or to be engaged in the business of insurance,' the deemer clause relieves plans from state laws 'purporting to regulate insurance.' As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plans. State laws directed toward the plans are preempted because they relate to an employee benefit plan but are not 'saved' because they do not regulate insurance. State laws that directly regulate insurance are 'saved' but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws.

111 S. Ct. 403, 409 (1990) (alteration in original).

84. *See supra* note 63.

Sec. 2. (a) An arrangement must annually obtain a certificate of registration from the department under rules adopted by the commissioner.

(b) An arrangement that does not obtain a certificate of registration described in (a) or violates the requirements of this chapter is subject to IC 27-4.[85]

Sec. 3. An arrangement may provide benefits under an employee benefit plan in Indiana only through an employee benefit plan that has been filed and approved by the department of insurance.

Sec. 4. An arrangement shall file an annual statement on a form prescribed by the commissioner.

Sec. 5. Except as provided by this chapter and by IC 27-9, Indiana insurance law does not apply to the operation of multiple employer welfare arrangements.

Sec. 6. (a) It shall be the duty of the department to examine every domestic multiple employer welfare arrangement at least every five (5) years or as often as the department in its discretion may deem necessary. The expense of such examination and or investigations of such arrangements shall be paid by the arrangement so examined.

(b) The commissioner shall revoke or suspend: (1) the certificate of registration to do business in Indiana any multiple employer welfare arrangement which refuses to permit such examination described in subsection (a); and any certificate of registration when any condition prescribed by the law or regulation for the issuance of continuance of the certificate no longer exists.

Sec. 7. If any domestic multiple employer welfare arrangement is insolvent or in imminent danger of insolvency, or fails or suspends operation between periods of examination authorized, it is a class A misdemeanor for the highest officer then actively in charge of such multiple employer welfare arrangement to knowingly fail to notify the department immediately, of such condition, failure, or suspension.

Sec. 9. The department of insurance shall adopt rules under IC 4-22-2 necessary to implement this chapter, including but not limited to:

(1) certificate of registration requirements;
(2) reinsurance requirements;
(3) reserve levels;

---

85. This section refers to Article 4 of the Indiana Insurance Code, which contains provisions applicable to Unfair Competition, Unauthorized, and Foreign Insurers. IND. CODE §§ 27-4-1-1 to -19 (1988 & Supp. 1992).

(4) deposits;
(5) financial reporting;
(6) fidelity bonds; and
(7) the operations of multiple employer welfare arrangements.[86]

This statute brings multiple employer welfare arrangements under the umbrella of state insurance regulations and squarely within the control of the state department of insurance.[87] The statute in fact refers to multiple employer welfare arrangements as "insurers." By doing so, it appears that this statute has deemed multiple employer welfare arrangements to be insurance companies or other insurers for purposes of state laws purporting to regulate insurance companies.[88] This is clearly inconsistent with the deemer clause and thus not a permissible function of the exception provided by ERISA for state regulation of self insured multiple employer welfare arrangements.[89]

Such an argument against these recently enacted state statutes is consistent with the broad scope of preemption accepted by the prior decisions of the Supreme Court.[90] And although the specific issue of state regulation of multiple employer welfare arrangements has not been addressed in the state or federal courts, the issue of preemption in general has been decisively determined.[91] In *Reilly v. Blue Cross*

---

86. *Id.* § 27-1-34-2 to -9. This statute was signed into law on May 10, 1991, and went into effect on July 1, 1991.

87. The previously discussed statutes of other states, especially those enacted in 1991 by Arkansas, New Mexico and South Dakota, have essentially the same requirements for multiple employer welfare arrangements. *See supra* notes 63, 67. As a result, these statutes have the same possible conflicts with ERISA preemption.

88. Similar to the Florida statute, *see supra* note 71 and accompanying text, the Indiana legislature anticipated a possible conflict with the ERISA preemption provisions. As a result, the legislature enacted the following provision:

> Sec. 10. This chapter does not apply to a multiple employer welfare arrangement which offers or provides benefits which are fully insured by an authorized insurer or to an arrangement which is exempt under the federal Employee Retirement Income Security Act (29 U.S.C. 1001 et seq.).

IND. CODE § 27-1-34-10 (Supp. 1992). The mere implementation of this provision, however, does not diminish the problem of regulation of self-insured multiple employer welfare arrangements, which remain strictly regulated under the Indiana Insurance Code. *See supra* note 86 and accompanying text. It is the argument of this Note that the provisions implemented by the Indiana legislature are in themselves violative of the deemer clause.

89. 29 U.S.C. § 1144(b)(6)(A)(ii) (1988).

90. *See* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990); FMC Corp. v. Holliday, 111 S. Ct. 403 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985); Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).

91. *See, e.g.*, Bone v. Association Management Services, Inc., 632 F. Supp. 493

& Blue Shield United of Wisconsin,[92] the Seventh Circuit Court of Appeals held that a self-insured benefit plan administered by Blue Cross was preempted from state laws by ERISA by means of the deemer clause.[93] In reaching its decision, the appellate court broadly accepted the distinction established in *Metropolitan Life Insurance Co. v. Massachusetts*,[94] between fully insured benefit plans and those that are self-insured, preempting self-insured plans from state regulation based upon the deemer clause.[95] The same arguably could hold true under the deemer clause for self-insured multiple employer welfare arrangements.

A strong argument exists that just as the federal courts have accepted the expansive scope of ERISA preemption as interpreted by the Supreme Court, they will also be likely to accept such an argument as it applies to multiple employer welfare arrangements, as the same policy issues and legislative intent issues apply. Multiple employer welfare arrangements often exist over the area of several states and provide affordable benefits to smaller employers and self employed individuals. To subject them to the requirements of extensive and differing insurance regulations could in fact cripple their operation, thus undermining the policies behind the adoption of the comprehensive ERISA legislation, namely providing well-being and security to employee beneficiaries through a uniform system of regulation.[96] The Supreme Court has concluded that it was the intent of the legislature to avoid such consequences, and stated that "'where a 'patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation,' we have applied the preemption clause to ensure that benefit plans will be governed by only a single set of regulations.'"[97] Accordingly, the Court rejected the possibility that self-insured plans might be subjected to different state regulatory schemes.

In the case of *Bone v. Association Management Services, Inc.*,[98] the district court did not specifically address the topic of the preemptive

---

(S.D. Miss. 1986); Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985); Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977); Standard Oil Co. of Cal. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977); Bell v. Employee Benefit Ass'n, 437 F. Supp. 382 (D.C. Kan. 1977).

92. 846 F.2d 416 (7th Cir. 1988).

93. *Id.* at 425.

94. 471 U.S. 724, 747 (1985).

95. The Supreme Court's broad view of preemption recently expressed in FMC Corp. v Holliday, 111 S. Ct. 403 (1990), was again accepted by the Seventh Circuit Court of Appeals in Maciosek v. Blue Cross & Blue Shield United of Wis., 930 F.2d 536 (7th Cir. 1991).

96. 29 U.S.C. §§ 1001, 1001a (1988 & Supp. II 1990).

97. FMC Corp. v. Holliday, 111 S. Ct. 403, 408 (1990). *See also supra* note 26 and accompanying text.

98. 632 F. Supp. 493 (S.D. Miss. 1986).

scope of the ERISA provisions regarding multiple employer welfare arrangements in its holding.[99] However, in a footnote, the court rejected the argument that under 29 U.S.C. § 1144(b)(6)(A)(ii), a multiple employer welfare arrangement could be extensively regulated by the state because the court could find no authority in support of such a proposition, as well as its broad reading of the deemer clause.[100] In addition, the court determined that the exception to preemption for state insurance regulation of multiple employer welfare arrangements "not inconsistent with ERISA"[101] was narrow, and the wording of this ERISA provision called for a case by case examination of the particular state regulation and its effects.[102] Whether other federal courts will adopt such a narrow reading of 29 U.S.C. § 1144(b)(6)(A)(ii) is difficult to determine since the issue is significantly one of first impression in virtually all jurisdictions. However, this narrow interpretation is consistent with the broad reading of ERISA's preemption and deemer clauses previously adopted in most jurisdictions.

Advocates of extensive state regulation of multiple employer welfare arrangements could also attempt to utilize a McCarran-Ferguson Act[103] argument in limiting ERISA preemption.[104] This argument, however, is weak in this instance for the same reasons it was rejected by the Supreme Court in *Metropolitan Life Insurance Co. v. Massachusetts*,[105] namely because ERISA is a statute relating to the business of insurance and thus an allowable exception under 15 U.S.C. § 1012(b) of the McCarran-Ferguson Act.[106] There is no reason why conflicts with McCarran-Ferguson would have a greater impact on the ability of ERISA to preempt state insurance regulation of multiple employer welfare arrangements than it has on preemption for single employer plans. Under its own

---

99. The district court in *Bone* held that the benefit plan in question was preempted by ERISA under the general preemption provisions, and that under ERISA, an employee benefit plan does not have to be actuarially sound and set up reserve or capital requirements. *Id.* at 493, 495.

100. *Id.* at 494-95.

101. 29 U.S.C. § 1144(b)(6)(A)(ii) (1988).

102. *Bone*, 632 F. Supp. at 494.

103. 15 U.S.C. §§ 1011-15 (1988 & Supp. II 1991).

104. *See supra* note 40.

105. 471 U.S. 724, 743 (1985).

106. The McCarran-Ferguson Act provides that Congress may not pass legislation that would impair state laws regulating insurance unless the particular federal legislation in question itself relates to the business of insurance. 15 U.S.C. § 1012(b). Based on this provision, federal courts have determined that the McCarran-Ferguson Act is not a barrier to ERISA preemption of state regulations. *See* Eversole v. Metropolitan Life Ins. Co., 500 F. Supp. 1162 (D. Cal. 1980); Hewlett-Packard Co. v. Barnes, 571 F.2d 502, 505 (9th Cir. 1978).

terms, McCarran-Ferguson allows ERISA to preempt state insurance laws, regardless of the type of ERISA plan in question.

The above argument advocating broad ERISA preemption of state insurance regulation of multiple employer welfare arrangements must take into account the additional risks to beneficiaries participating in multiple employer plans. These risks, and the inability of courts to resolve them from the language of ERISA, are what prompted Congress to adopt the 1982 amendments specifically addressing multiple employer welfare arrangements.[107] Unfortunately, the provisions that came out of those amendments do not appear to give state legislatures sufficient guidelines to follow in adopting regulations for multiple employer benefit plans, and thus legislatures are passing statutes extensively regulating such plans. Although those statutes in effect eliminate the problems of unregulated plans and protect the strict financial interest of their beneficiaries, they create new, and perhaps even greater, problems in light of congressional intent in enacting ERISA. These problems are great in that by forcing compliance to extensive insurance regulations, as well as conflicting regulations between states, the states may in fact eliminate the ability of small employers to band together and provide reasonably priced health care coverage through multiple employer benefit plans.

IV. Conclusion

This Note has demonstrated the broad scope of federal preemption provided by ERISA as interpreted by Congress and the United States Supreme Court. It has also demonstrated the continuing problems that conflict between federal and state law generates. Although the scope of ERISA's preemptive power appears to be decisively broad with regard to single employer plans, and this broad scope appears to be firmly rooted in Supreme Court precedent, the position that the Supreme Court, as well as the lower federal courts, will take with regard to multiple employer welfare arrangements is unclear and left largely to speculation at this point. Unless Congress addresses this issue and amends ERISA once again to clarify what it intends the states' role to be in regulation of multiple employer plans, this issue will in all likelihood be a subject of extensive litigation in the next decade.

---

107. *See supra* note 58 and accompanying text.

Indiana Law Review

Volume 26 1992 Number 1

COMMENT

Some Real-Life Observations About Judging

Patricia M. Wald*

Introduction

I would like to share with you some personal observations about being a judge in America in the 1990s. Is it a great or even good job? For a woman, is it worth the price of getting there? How do politics and ideology affect the job? What is it really like? Can women judges make a difference? How much of a difference?

In the late 1970s when I first became a judge and women were struggling for a foothold in the judiciary, it was not "politically correct" to ask these questions. But our numbers are stronger now. Many of us have a decade or more of experience under our belts, and there are, I believe, lessons we can pass on to an audience of talented lawyers and law students who may one day have to make the choice of whether or not to become judges.

One of my illustrious predecessors on the D.C. Circuit, Harold Leventhal, after fifteen years, described judging as the best job in the world. "Sometimes I can't believe I am being paid for it," he said. On the other hand, Thurman Arnold, the old trustbuster of the 1930s and 1940s, left the same bench after only a few years observing: "I resigned from the United States Court of Appeals in Washington, D.C. about two years ago because I found the work of a Judge much duller than that of an advocate. . . . [A]ll we did was to listen to argument

* Circuit Judge, United States Court of Appeals for the District of Columbia. This material was presented in a speech at the Indiana University School of Law-Indianapolis.

and write opinions."[1] A few months ago, one of our brightest district judges resigned after thirteen months of undisguised misery on the job.[2]

Judging is not for everyone. Since 1974, there have been seventy-two resignations from the federal bench. Sometimes late at night, watching old movies on cable, the image of the revered, wise, omniscient, at peace-with-the-world judge—Andy Hardy's father—appears on the screen. Who would not want to be his female counterpart? If the life of a judge was ever really like that, it certainly is not now.

Judging is at times lonely, isolating, and frustrating. Judges do have some power, but it must be exercised within tight limits. As a judge, you can never initiate action, only react to what is put before you. A judge can never treat a problem comprehensively, only in unconnected pieces. With judging, you almost never get feedback. I have little idea, even after thirteen years and more than 500 published opinions, which cases I ruled correctly on and which I flubbed. In that respect, I feel much like the blindfolded dart thrower who, no matter how hard he practices, never improves.

Like Thurman Arnold, I found the excitement and highs of advocacy more attractive than judging when I was younger. I think that youthful aspirants to the courts ought to be cautious. My former colleague Bob Bork once described an appellate judgeship as being "condemned for life to a law review." In my retrospective sixties, I cannot conceive of spending thirty to forty years on the bench. Judges tend to get stale and bored after that long, excluding such notable exceptions as Oliver Wendell Holmes, and, of course, Skelley Wright, and David Bazelon on my own court. When the founding fathers bestowed life tenure on federal judges, the average life expectancy of men was in the forties. If we were drafting anew, a twenty-year nonrenewable term with good pension benefits would be worth thinking about.

If you are aiming toward the judiciary, think also about the differences between trial and appellate courts. Trial judges run their own courtrooms, manage their own proceedings, and have elbow room to experiment with "creative" settlements and remedies. They talk to lawyers, witnesses, and juries every day and, even on occasion, to the press. Their wits are challenged by the need to resolve controversies about arcane procedures and points of evidence on the spot so that

---

1. SELECTIONS FROM THE LETTERS AND LEGAL PAPERS OF THURMAN ARNOLD 3 (1961).

2. Sandra Torry, *Some Judges Decide a Lifetime on the Federal Bench is Too Long*, WASH. POST, Jan. 20, 1992, (Business), at 5.

the trial can keep moving. Trial judges are seldom, if ever, in conflict with their fellow trial judges, and can therefore be truly collegial with them, often united by common contempt for the appellate courts which review their work. An old saw declares that appellate judges are like generals who stand above the battle, and when it is over come down to shoot the wounded. Some of the finest trial judges I have known repeatedly and decisively turned down appointments to appellate courts. The diversity of experience, the exposure to real people, and the autonomy of the trial judge make it a far more attractive situation for activist personalities, and certainly for younger lawyers, than appellate judging. I have often been perplexed by the reverse order of prestige that attaches to the two levels.

I. Is a Judgeship Worth the Price of Getting There?

The price you pay for a judgeship fluctuates from person to person and from administration to administration. The vetting of a candidate's past both before and after a judicial nomination is fiercesome. The confirmation process is open season on your private life. You know of some of the recent imbroglios: Bork, Ginsburg, Thomas. In my case, my daughter's landlord, my son's high school coach, and my gynecologist were interviewed. For aspiring judicial candidates, youthful indiscretions had better be faced early on; forgiveness may not be forthcoming. One of the downsides to the advice I have just given about not becoming a judge too early in life is that the longer you wait, the more the bloodhounds have to track down. Living a publicly blameless life is an essential *sine qua non* for a judgeship. However, it is only the upfront part of the price a judge must pay.

The serious part of the tab is the surcharge on political correctness, and here I use the term in its more literal sense. I think our current judicial appointment system is upside down. In the search for ideologically compatible judges, particularly in the appellate courts and the Supreme Court—which Presidents from Jefferson on down have engaged in but which I think has greatly accelerated in recent years—I fear we are in danger of abandoning any sense of what a judge should be. My own naive belief is that a judicial candidate should have a track record of achievement and distinction, whether in private practice, government service, or teaching.

I appreciate the realpolitik of conservative Presidents not nominating liberal judges, and vice versa. However, there have been commendable examples of past Presidents who nominated judges from other parties on the basis of their achievements and reputations for excellence, fairness, courage and the like. Party affiliation aside, we should expect nominations for high judicial posts to be men and women who have excelled at what

they have done, who enjoy the respect and confidence of those with whom they have worked, even their opponents, and who stand out among their peers. When the drive for ideological purity outdistances any attempt to find the best and the brightest, the seasoned and the respected, even within the President's own party, we are in trouble.

Future chroniclers of our times may find it inexplicable that so few in our sophisticated system of government—a system that we so proudly proclaim as a model for emerging democracies all over the world—stand firm for a meritocracy in judicial selections and that we cannot agree on an objective standard of accomplishment for judicial candidates.

When I came on the bench, there were judges picked by Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter. This resulted in diverse viewpoints, although, unfortunately, not enough diversity of race or gender. Today, well over sixty percent of the federal judiciary has been selected by Presidents Reagan and Bush. The range of diversity is much narrower on the basis of political affiliation alone. When this fact is compounded by an overreliance on philosophical conformity as the touchstone for appointments, diversity will likely disappear altogether. This, in my view, is not good for the judiciary or the nation, nor is it in the view of an avowedly conservative judge, Richard Posner, who has written in his latest book:

> Law uses a crude methodology to deal with extremely difficult questions. . . . America no longer has a homogeneous legal establishment . . . . There are no "logically" correct interpretations . . . no overarching concepts of justice that . . . give direction to the enterprise. . . . The more diverse the judiciary, the more robust are the decisions that gain strong support in it. . . . A diverse judiciary exposes [and] reduces the intellectual poverty of law. . . .[3]

II. What Do Judges Actually Spend Their Time Doing?

The ordinary citizen does not have a clue as to how judges spend their time. As a member of a twelve-person court of appeals, I sit on 115 appeals a year, plus several hundred motions and summary appeals (no oral argument). Except for the three or four hours a day, four days each month when we hear oral argument, plus the hour of conferencing with fellow panelists after each day's argument, and monthly judges' meetings about court administration, I spend the rest of my time in chambers with three law clerks and two secretaries. The District of

---

3. Richard A. Posner, The Problems of Jurisprudence 458, 460 (1990).

Columbia Circuit specializes in administrative appeals, which comprise more than sixty percent of our docket. These appeals involve long agency records which require me to read, on the average, 7000 to 8000 pages of briefs and records a month. Before the argument in each case, I gather my preliminary thoughts, along with any questions I want to pursue at oral argument. My law clerks, who split each month's docket in thirds, write bench memoranda on the cases, which I review after I read all of the original material. Sometimes law clerks detect issues or errors I missed and vice versa. In this respect, we reinforce each other. The law clerks also carry on a lively dialogue with clerks in other chambers which often provides useful point-counterpoint that would not otherwise exist, because judges almost never discuss cases with each other before argument. Basically, the only person a judge has to bat the case around with is a captive law clerk fresh out of law school.

Oral arguments are the fun part of being a judge, getting to joust and parry with counsel, to probe, to surface the unraised issue, and to extract concessions. Although the volume of case filings allows argument in only half of all cases, oral argument is prized by the judges as the only time when we get to relate to the outside world, the only time cases take on a human face, and the only time we get to flex our intellectual muscle against live opponents. Oral arguments are short—fifteen to twenty minutes is the average in our court—after which we are cast back into our monastic lives. For this reason oral arguments can be misleading. Never rely on the mood or even the intensity of the questioning from the bench as an indicator of the outcome. Judges play devil's advocate perhaps more than we ought. We test each other's mettle and make debaters' points in public because we rarely have extended discussions in private. However, oral argument lasts only for twelve or so hours a month. The rest of our time is spent in relative solitude.

After the arguments each day, the judges confer. When I first came on the court, I imagined that conferences would be reflective, refining, analytical, dynamic. Ordinarily they are none of these. We go around the table and each judge, from junior to senior, states his or her bottom line and maybe a brief explanation. Even if the panel is divided, the discussion is exceedingly crisp. The conference changes few minds. Assignments are made, life goes on. Chief Justice Rehnquist, in his book on the Supreme Court,[4] says that much the same thing is true on his Court. He speaks of a "practice of not discussing the merits of cases at conference" because "there is usually 'no real prospect that extended discussion would bring about crucial changes in position on the part of one or more members of the court.' "[5]

---

4. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS (1987).
5. *Id.* at 294-95.

Back in chambers, the judge and law clerks work on the opinions assigned to the judge. The clerks usually block out a first draft, much reworking and editing occurs, and a penultimate draft is eventually sent to the panel. Panel members sometimes accept the draft uncritically (usually if they are of the same basic views as the writer), sometimes suggest changes, sometimes (particularly if the case reflects a compromise of sharp differences) go so far as to edit the draft. Every month each judge undertakes this process for at least three or four published opinions and many more unpublished memoranda. In recent years, our court has quite effectively brought its docket current. About the time we circulate last month's drafts, a new cycle of reading briefs and preparing for the next round of oral arguments begins.

What do we *not* spend our time doing? Talking or discussing cases with our colleagues. Tightly worded memoranda are our major mode of communication between conference and circulation of first drafts.

Thinking great thoughts is also out. Forty to forty-five published opinions a year to write, ranging from ten to 110 pages each, consumes our time. The elegant prose, the visionary idea, the qualitative leap forward in the law will probably be canceled by the practical necessity of getting consensus among more cautious colleagues. Final opinions will usually be committee products with all the obstacles to virtuoso performance that entails.

We also do not speak out much on the burning issues of our time. The ethical restrictions on a federal judge are formidable. Judges may not join organizations which stand for controversial principles,[6] participate in political affairs, make political contributions,[7] or conduct fundraising for any cause, no matter how worthy;[8] judges cannot sit at the head table or speak at a fundraiser,[9] march or demonstrate or write letters to the editor on any issue likely to come to court,[10] appear before any legislative body or executive agency on behalf of any cause outside of our judicial expertise,[11] accompany a spouse to a political event, even if he or she is running for office;[12] earn more than $19,000 extra in teaching or other legitimate occupation;[13] sit on any board of a profit-making organization,[14] join any organization which is likely to appear

---

6. CODE OF JUDICIAL CONDUCT Canon 5(A) (1975).
7. *Id.* Canon 7(A)(1)(c).
8. *Id.* Canon 4(C),5(B)(2).
9. *Id.* Canon 5(B)(2).
10. *Id.* Canon 5(A).
11. *See id.* Canon 4(B).
12. *See id.* Canon 7(A)(1)(c).
13. 5 U.S.C. app. 7, § 501 (1988 & Supp. 1991).
14. *See* CODE OF JUDICIAL CONDUCT Canon 5(B) (1975).

before the court,[15] or talk to anyone outside the court (presumably even our spouse) about any issues that might come up in court.[16] In everyday terms, this means a judge is often a conversation stopper at cocktail parties, a dull dinner companion, a frustrated citizen, and a sterile source of support in community affairs. The road to anonymity is paved with appellate judges whose names appear in the newspapers only in the most unfortunate contexts. If lucky, judges' good deeds merely go unrewarded. If unlucky, we are roundly punished for them.

Not much time is spent socializing or just plain schmoozing with fellow judges. Real friendships are rare on the court. Heartfelt differences of philosophy and ideology militate against them. Powerful egos often impede them, even among philosophical allies. Judges are like monks without the unifying bonds of a common faith. They are consigned to one another's company for life. They cannot speak about their work outside the walls of the monastery. Lingering resentments and hostilities must be kept under wraps—and a bottle of Mylanta at hand—to preserve the image of a court that is impartial and neutral enough to decide other people's disputes.

My daughter has often told me that I suffer from peer deprivation, and she is absolutely right. My advice is never to sacrifice your family or even close friendships to a judicial career, for without the first, you cannot do right by the second.

Lest you think me unduly cynical, let me refer you to another excerpt from Judge Posner's book. He writes:

> [Judges] rarely level with the public—and not always with themselves—concerning the seamier side of the judicial process. This is the side that includes the unprincipled compromises and petty jealousies and rivalries that accompany collegial decision making, the indolence and apathy that life tenure can induce. . . .[17]

Actually, I am a bit more optimistic than Judge Posner and find judging a mixed bag, with the good parts usually outweighing the unpleasant. However, a dose of realism about the less enthralling parts of the job is something prospective judges need to confront.

III. How Much Does Politics Enter Into Judging?

We are a political democracy. Politics is built as securely into our constitutional scheme as the Russian wiretaps into the old American Embassy in Moscow. To dislodge them one would have to demolish the

---

15. *Id.* Canon 5(B)(1).
16. *Id.* Canon 3(A)(6).
17. Posner, *supra* note 3, at 190-91.

whole structure. Our colleagues are our colleagues as a result of politics. The kind of controlling precedent the Supreme Court hands down to lower courts reflects the makeup of that Court and has been determined, in large part, by the politics of the nomination and confirmation process. In that narrow but important segment of the caseload (I estimate it at about fifteen percent) where judgment counts, whether your view or an opposing one will prevail often depends on the political philosophy of the majority. I am not saying anything so simplistic as that judges always vote in favor of the philosophy of one party or the other. However, the values by which judges make choices in areas of discretion will more often than not be in sync with that section of the political spectrum they inhabited in their former lives.

Should there be more or less access to federal courts for dispute resolution? Do the Fifth and Fourteenth Amendment guarantees of equal protection of the laws prohibit disparate treatment for members of groups who have historically suffered societal discrimination? What does "liberty" in the Fourteenth Amendment encompass? Does a woman have the right to control her own reproductive processes? Such searing controversies are played out against a backdrop of judges' values and preferences as well as judicial precedents.

As the philosophical balance of our appellate courts and Supreme Court shifts precipitously to the right, we can see the impact on our jurisprudence. We still operate under the same Constitution, basically the same federal rules, and most of the same statutes that were in effect ten years ago. However, circuit court precedent changes daily. Old precedent is overruled or distinguished away, and the law takes different turns in many areas. In the District of Columbia Circuit, doctrines on standing, ripeness, Freedom of Information Act law, and the boundaries of Fourth Amendment searches and seizures are unrecognizable from a decade ago when I came on the court. The role of politics and elections in our jurisprudence, while not always predictable in the short run, is inexorable in the long run. Presidents have always instinctively known that. Recent Presidents have aggressively exploited it.[18]

Thus, jurisprudence does follow the elections, slowly and subtly, not always completely but usually quite perceptibly, especially when one party controls the White House for a long time.

IV. Where Does Judicial Philosophy As Contrasted With Politics Enter the Picture?

We hear much these days about purported conflicts between judicial activism and judicial restraint, between so-called "principled" and "com-

---

18. *See, e.g.*, William F. Buckley, *A Serious Question That Conservatives Need to Answer*, Wash. Post, Feb. 23, 1992, at C7 ("George Bush has been entirely orthodox in his nominations to the Supreme Court and to the lower courts.").

passionate" decisionmaking. In the tensions of these judicial times the concepts seem bent out of shape. The most zealous and activist judges—those most insistent on reaching out to find cases as vehicles to announce or pronounce new or modified principles of law—accurately consider themselves steadfast practitioners of principled decisionmaking. The line between what Judge Harry Edwards of my court calls "ideological maneuvering"[19] and what others call "principled decisionmaking" is a thin and sometimes invisible one to the engaged participant. For many judges, their ideologies are their principles.

Another colleague, Judge Laurence Silberman, writes critically of the "compassionate judge" who, he says, has no fixed ideology, who too often fashions the law to meet a desired outcome.[20]

There you have it: The liberal judge worries about ideological maneuvering; the conservative judge worries about pragmatists who decide cases ad hoc on the merits. Which is activism, which is restraint? Who is the more principled? The culmination of this, in my view, largely sophistic debate came in a recent "op-ed" piece of the *Wall Street Journal* praising newly confirmed Justice Thomas as being an example of "activist judicial restraint."[21]

Candidly, the new judicial epithets of "unprincipled" and "compassionate" judges leave me just as cold as the old "activist" or "restraint" labels. On my court, so-called conservative judges, professing to abide by judicial restraint, are as commonly found rejecting executive agency decisions, overturning precedent, and raising issues sua sponte, as their liberal colleagues. Both kinds of judges are, of course, motivated by the goal of principled and coherent decisionmaking.

So what, if any, judicial philosophy should a judge adopt? The closest approximation I can espouse is something that some of my colleagues roundly denounce: A pragmatism that decides cases on the merits, what Judge Posner calls "practical reason," that takes all the circumstances including precedent, real-world significance and institutional relationships with the other branches into consideration, tempered on occasion by compassion.[22]

It is time to abandon labels that no longer have accepted meaning and to recognize that judges are human beings bent on arriving at the best solutions to societal problems put before us in the context of the

---

19. Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 849.

20. Laurence H. Silberman, *The American Bar Association and Judicial Nominations*, 59 GEO. WASH. L. REV. 1092 (1991).

21. L. Gordon Crovitz, *Justice Thomas's Opinions: No Wonder They Wanted to Stop Him*, WALL ST. J., Jan. 29, 1992, at A13.

22. POSNER, *supra* note 3, at 454-69.

political reality that the President and Congress make and enforce the laws and usually, but not always, know more about how to do it properly than judges do. For our citizens to have confidence in the courts' decisions, they must be convinced that judges are impartial as to litigants, including the state, and that we are not embarked on personal ideological crusades. This is the closest I have been able to come to a judicial philosophy.

V. Are Women Judges Treated Differently and Do They Make Any Difference?

This is really an entirely separate subject, worthy of a separate speech, but let me touch on a few highlights. From the beginning, women lawyers and judges have asked two questions: Will we really be treated as equals with men judges, and will our presence make any difference in the way the law develops? As to the first question, I believe women judges still find they are expected to prove themselves to their peers, to courthouse staff, to lawyers, and even to law clerks. The question is always out there about a woman judge: Is she as smart, as dependable, as quick, and as stable as her male colleagues, or is she maybe a little spacey? The federal judiciary is still a predominantly male institution (well over eighty-five percent),[23] and, in the main, it still thinks in male terms, though the number of judges' daughters attending law schools is probably the single greatest facilitator of attitudinal change we have going for us. It is frustrating that in a profession with twenty-five percent women practicing attorneys and fifty percent women law students we still have only one woman on the Supreme Court, four federal circuit courts out of thirteen on which no woman sits, only three on which more than two sit, and that there are sixty out of ninety-four federal district courts on which no woman sits.[24] The number of women in the United States Judicial Conference, the governing body of the federal judiciary, is under ten percent.[25] The number of women heading or serving on key Judicial Conference committees is just as small.

I see those numbers reflected frequently in the reactions of that body to important legislative overtures. The Violence Against Women Bill,[26] which would have treated violent acts of men toward women in the same fashion as racial violence, was opposed by the Judicial Conference on the ground "it would embroil the federal courts in domestic relations disputes" and "flood [the federal courts] with cases that have

---

23. *See* Judicial Staff Directory (1990).
24. *Id.*
25. *Id.* at 297.
26. S. 15, H.R. 1502, 102d Cong., 1st Sess. (1991).

been traditionally been the province on the state courts."[27] Translated, this means that it is permissible to have fender bender cases, minor contract diversity actions, agency claims of any size, and nickel-dime drug busts in federal court, but not cases where women are battered or beaten.

Through seniority, women on the bench will eventually rise to positions of power in the federal and state judiciaries. Hopefully, these women will wield their power to assist other women in the legal profession rise by selecting worthy women for key administrative court staff positions, introducing jobsharing and flexible time arrangements, and creating the invaluable job networks for upwardly mobile women law clerks and attorneys. It is also important for lawyers and litigants to see women on the bench. It gives assurance to women lawyers that they will not be perceived as anomalies. As the number of women judges has increased I have personally noticed that law firms and government offices more frequently use women as lead counsel and at counsel tables. However, we still have a long way to go in removing all residue of a double standard.

The second question I posed is a more difficult one. Is there, as we would all like to think, a secret spring of sensitivity to women's or even humanity's plight and problems that a woman judge can bring to the law? On balance, I think so. Although I am usually six leagues deep in administrative law and regulatory agency cases, there have been those rare and satisfying occasions when I do see something in a case that my male colleagues simply "don't get": intuitive negative reaction to an asserted but undocumented justification that women did not get choice assignments in an agency because they choose not to compete for them, a sensitivity to a male colleague's patronizing attitude toward women lawyers or litigants, or a heightened understanding of the real but ineptly articulated reasons why women need to be represented in media power positions.

A women's experience does add something special to the interpretation of events, which is a crucial element of judging. This need not be seen as a discrete woman's voice which changes the outcome of cases, but rather as an additional lens through which arguments, rationales and justifications are filtered to create an accurate image of reality.

This is occurring visibly right now in some state courts. For instance, all three women judges on the Minnesota Supreme Court voted together to impose a protective order against visitation by a father who had

---

27. Ad Hoc Comm. on Gender-Based Violence, United States Judicial Conference, Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence 1, 7 (1991).

threatened to kill his estranged wife unless she stopped seeking custody of their children.[28] The men on the court voted two to one to deny the order; the women carried the outcome. A recent study showed that just one woman on the state supreme court significantly increases the number of pro-woman rulings in discrimination, alimony, and property settlement cases.[29] Another earlier study concluded that although American judges had largely succeeded in efforts to free themselves from stereotypical habits of thinking about race, the same was not true as to gender.[30]

Many male judges still adhere to traditional notions about the essential "natures" of men and women and the appropriate roles these "natures" dictate in society.[31] One dramatic example is illustrative. In twenty-two right-to-die cases in fourteen states from 1979 to 1989, courts tended to view as rational a man's pre-illness statement about his wish to die rather than be maintained on life-support, while women's pre-illness statements were more often regarded as emotional, unreflective, and not to be credited.[32] In seventy-five percent of the men's cases (but in only fourteen percent of the women's cases) were the patients' expressed wishes honored.[33]

Bertha Wilson, the first of three women justices on the Supreme Court of Canada, recently registered her belief that there is a substantive component that women can add to the law. Justice Wilson said:

> Men see moral problems as arising from competing rights; the adversarial process comes easily to them. Women see moral problems as arising from competing obligations, the one to the other; the important thing is to preserve relationships, to develop an ethic of caring. The goal, according to women's ethical sense, is not seen in terms of winning or losing but, rather, in terms of achieving an optimum outcome for all individuals involved in the moral dilemma. It is not difficult to see how this contrast in thinking might form the basis of different perceptions of justice.[34]

---

28. David Peterun, *Women Judges Shifting Balance in Sex-Based Cases*, MINN. STAR TRIB., Dec. 23, 1991, at 1.

29. *Id.*

30. John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675 (1971).

31. Norma Juliet Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980).

32. *Id.*

33. Steven Miles & Allison August, *Courts, Gender and the 'Right to Die'*, 18 LAW, MED. & AND HEALTH CARE 85 (1990).

34. Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOODE HALL L.J. 507, 520 (1990).

The law, in America as in Canada, is still a harsh mistress, and despite the burgeoning literature of feminism, basically gives no berth to feminist critiques about legal institutional structures and norms that perpetuate the power of men over women. Candidly, most women judges do not yet feel confident enough to even mention such notions in explaining their judgments. Perhaps time and growing self-confidence will make a difference in this area. For now, the judiciary is still a newly integrated male club, and women judges are expected to be agreeable, charming, bright, incisive, nonthreatening, loyal, not irritatingly individualistic, supportive, cheerful, attractive, maybe witty—to a point, but not pushy, insistent, aggressive, sarcastic, unyielding, or any of the other qualities our male colleagues exhibit every day.

VI. Bottom Line: Is Judging a Worthwhile Occupation?

After all this you may well ask whether being a judge is worthwhile at all. My answer is yes. I guess I knew from the moment that I clerked for a judge after law school that judging was where I wanted to end up. Precedent can constrict your decisions and a majority of the court can outvote you, but in the most fundamental sense you are your own woman, albeit often a lonely one. In the words of one of my favorite mystery writers, as a judge you can "deal straight and sleep at night."

A judge can do some good. Even when the laws on the books are distasteful and the directives from higher courts seem obstinate or insensitive, there is often room in individual cases for discretion and interpretation and judgment. Just meander through any volume of the Federal Reporter and glimpse at the incredible range of human problems presented to our courts for resolution. Judges, whether committed to judicial restraint or to judicial activism, seize these opportunities every day, I can assure you. Judicial work is ever-changing even if your judicial colleagues are not.

Ultimately there must be judges to resolve disputes between people, organizations, political branches, and different levels of government. There must be judges in whom citizens and officials repose enough confidence not to take to the streets when they do not like their judgments. During the past year and a half, I have journeyed to Eastern Europe seven times as a member of various delegations sent to explain our constitutional system to Czechs, Bulgarians, Romanians, Lithuanians, and Russians. Coming out from under Socialist regimes where judges have been considered state apparachniks, lowly paid and lowly regarded, and either outrightly corrupt or subject to party discipline, those countries marvel at a judiciary like our's where judges are truly independent and no one dares to tell them how to rule. Even more startling to them is the power entrusted in our judges to declare acts of the executive or

legislature invalid. The uniqueness of our judges' power and prestige is unknown in nine-tenths of the world. Our problem is to preserve it and use it to the best purposes so its currency does not deteriorate.

Being a judge requires guts, intelligence, some guile, perseverance, the will to win over boredom, overwork, understimulation, lack of fun and camaraderie in the workplace, no reward or incentive programs, modest pay, lack of upward mobility, nonexistence of feedback, isolation, and for the most part, anonymity. To paraphrase the late Robert Hutchins, it's not much, just the best there is.